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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPE LINE COMPANY OF AMERICA and NGPL-TRAILBLAZER, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether orders of a federal administrative agency that are silent on preemption can be held by inference to oust a state's traditional authority to remedy a breach of the contractual duty of good faith and fair dealing on the grounds that agency orders must have "room to breathe."

2. Whether a jury verdict that defendant attempted to monopolize, based on proof that defendant through predatory conduct excluded its lower-priced competitor and then charged supra-competitive prices, can properly be overturned on appeal solely because:

   a. A 54% market share, though achieved through predation and resulting in supra-competitive prices, is not in the court's estimation close enough to monopoly to support a verdict of attempted monopolization; and

   b. The monopoly power and supra-competitive profits achieved by predation would not last for more than six years.

PARTIES

The parties to the proceeding below were: Colorado Interstate Gas Company, Natural Gas Pipe Line Company of America, and NGPL-Trailblazer, Inc. A list of the parent company, subsidiaries and affiliates of the petitioner previously has been filed with this Court as Appendix A of Petitioner's Application for an Extension of Time within which to File Petition for a Writ of Certiorari.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 885 F.2d 683, and is included in the Appendix at pp. 1a-28a. The order of the court of appeals denying rehearing is included in the Appendix at pp. 87a-88a. The opinion of the district court denying respondents' motion for judgment notwithstanding the verdict and for a new trial is reported at 661 F. Supp. 1448, and is included in the Appendix at pp. 29a-86a. In addition, for the convenience of the Court, four opinions of the Federal Energy Regulatory Commission germane to the first question presented are also reproduced in the Appendix at pp. 1b-74b.

JURISDICTION

The opinion and judgment of the court of appeals was entered on September 11, 1989. A timely petition for rehearing was denied on December 12, 1989. An extension of time within which to file a petition for writ of certiorari was granted by this Court on February 28, 1990, extending the time for filing this petition until March 26, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI of the Constitution of the United States, states in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI.

Section 2 of the Sherman Act provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2.

Section 4 of the Clayton Act provides in pertinent part: "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.

STATEMENT OF THE CASE

Petitioner, Colorado Interstate Gas Company ("CIG") brought this case against respondents, Natural Gas Pipeline Company of America ("NGPL") and NGPL-Trailblazer, Inc., alleging that NGPL had attempted to monop-

olize the market for long-distance transportation of Wyoming gas in violation of Section 2 of the Sherman Act. CIG also asserted that NGPL breached its contract with CIG, breached its duty to perform that contract in good faith, and tortiously interfered with contractual relations. A jury returned a verdict for CIG on all counts, and the district court sustained the verdict against respondents' motion for judgment NOV.

The court of appeals affirmed the tortious-interference verdict, but reversed the remaining claims. The court held that a series of Federal Energy Regulatory Commission ("FERC") rulings expressly preempted CIG's simple breach of contract claim, a ruling not challenged in this petition. It also held, however, that CIG's separate claim that NGPL breached its duty to perform in good faith was preempted (and indeed that all "actions based upon breach of contract" were preempted), *even though FERC had never addressed such claims*, on the theory that FERC orders "must have room to breathe." App. 11a-14a & n.9. Furthermore, although the court of appeals agreed with the jury and district court that NGPL had engaged in blatently "predatory conduct" that had excluded a low-cost competitor and had enabled NGPL to expand market share to 54% while charging "supracompetitive prices" (*id.* at 27a), it reversed the Section 2 verdict because it believed it unlikely that respondents' Trailblazer System would ever achieve a 70%-80% market share or that NGPL would be able to charge supracompetitive prices for more than six years.

The Tenth Circuit's preemption and antitrust rulings create and exacerbate conflicts with other circuit courts on recurring and fundamental legal issues. The Fifth Circuit has expressly refused to preempt breach of good faith duty claims (let alone all contract remedies) simply because some contract claims are preempted by FERC rate-setting. Moreover, several circuits have held that proof of unambiguously predatory conduct that allows a

predator to capture half of the market and charge supra-competitive prices is sufficient to support a Section 2 verdict, and petitioner is aware of no other court that has ever excused such conduct on the ground that its patently anticompetitive market effects would last only six years. Both rulings warrant this Court's review.

A. Factual Background

1. *The parties.* CIG is a pipeline company that buys, transports, and sells natural gas. CIG's pipeline begins in southwest Wyoming, runs east to Cheyenne, then turns south through Colorado and continues into the Oklahoma and Texas panhandles. At that point, CIG's pipeline connects with other major "trunk" lines that can carry the gas to the Midwest and elsewhere. (A map showing the principal pipelines involved is provided for the Court's convenience at App. 75b.)

NGPL is also a pipeline company. It owns one of the pipelines that intersects with CIG's in Oklahoma, runs northeast from Oklahoma through Beatrice, Nebraska, and terminates in Chicago, Illinois, where NGPL sells natural gas to consumers. For many years, NGPL has purchased gas from CIG that CIG had transported to Oklahoma from points north and west and delivered there to NGPL. NGPL also has the largest interest in a relatively new pipeline, called the Trailblazer System, that transports gas from southwest Wyoming to the midwest. NGPL-Trailblazer, Inc., a wholly owned subsidiary of NGPL, together with two partners, owns one of three segments of the Trailblazer System.

2. *The Service Agreement.* In 1982, CIG and NGPL entered into a seven-year Service Agreement that required CIG to deliver and NGPL to purchase substantial volumes of natural gas. The contract included two different rates for gas, a higher rate ("H-1") for gas delivered to NGPL from CIG's pipeline system, and a lower rate ("F-1") for gas delivered from the field. App. 3a.

The Service Agreement contained both a "minimum take" and a "minimum bill" provision (Sections 2 and 4, respectively). The minimum take provision required NGPL to purchase and take delivery of a specified volume of gas on a daily basis. The minimum bill provision required NGPL to pay CIG for at least 90% of the specified total annual volume of gas, regardless of how much gas was actually taken, to be calculated at the F-1 rate. App. 5a-6a.

3. *FERC's Regulatory Actions.* Under the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. §§ 717-717w, and the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3319, FERC has extensive authority to review, approve, and modify contracts for the sale and transportation of natural gas. In the early 1980's, FERC issued a series of orders applicable generally to pipeline contracts containing minimum take and minimum bill provisions.[1] These orders allowed pipelines to recover only their fixed costs (and not their variable costs) from buyers that fail to purchase their minimum volume and thus incur liability under minimum take or minimum bill provisions. These orders, however, do not release pipelines from their obligation under the NGA to stand ready to deliver the full volume of gas specified in the contract.

FERC issued these orders in response to what it termed "dramatic changes" in the market for natural gas. Order No. 380, 49 Fed. Reg. at 22,781. By the early 1980's, the natural gas shortage of the 1970's had ended and was replaced by a gas glut. In this environment, minimum bill provisions, if fully enforced, served to discourage

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[1] See Order No. 380, 49 Fed. Reg. 22,778 (1984), FERC Stat. & Reg. Preambles (CCH) ¶ 30,571 (June 1, 1984) (codified at 18 C.F.R. § 154.111); Order No. 380-A, 49 Fed. Reg. 31,259 (1984), FERC Stat. & Reg. Preambles (CCH) ¶ 30,584 (Aug. 6, 1984) (codified at 18 C.F.R. § 154); Order No. 380-C, 49 Fed. Reg. 43,625 (1984), FERC Stat. & Reg. Preambles (CCH) ¶ 30,607 (Oct. 30, 1984) (codified at 18 C.F.R. § 154); Order No. 380-D, 49 Fed. Reg. 50,634 (1984), FERC (CCH) ¶ 61,332 (Dec. 21, 1984) (codified at 18 C.F.R. § 154).

buyers from seeking out cheaper sources of gas. *Id.* By limiting the buyer's exposure under such provisions to reimbursement of the pipeline's fixed costs, FERC intended to foster competition by encouraging buyers to seek out the lowest prices for gas. *Id.*

In a separate series of orders, FERC reviewed the Service Agreement at issue here and specifically addressed the question of how to calculate the minimum bill in the event NGPL failed to meet its purchase obligations.[2] FERC ruled that, under the minimum bill provision of the Service Agreement and in light of Order No. 380, CIG was entitled to recover only its fixed costs for gas not purchased, and that these costs were to be calculated at the F-1 rate. App. 7a. At no point, however, did FERC address the question of how to calculate damages if NGPL refused to purchase CIG's gas in bad faith and as part of a plan to destroy competition and raise transportation prices. *Id.* at 11a n.9, 12a.

4. *The Trailblazer System.* The gas shortage of the 1970's led to the discovery of substantial gas reserves in southwest Wyoming. Anxious to secure access to these reserves, NGPL became the principal proponent of and eventually held the chief financial interest in a new pipeline to transport natural gas out of southwest Wyoming. Known as the Trailblazer System, this pipeline runs parallel to CIG's pipeline as far as Cheyenne, but then continues east to Beatrice, Nebraska, where it intersects the NGPL line. It thus provides an alternative to CIG's pipeline for moving Wyoming natural gas to the midwest. *Id.* at 31a; see App. 75b (map).

Although FERC approved the pipeline in 1978, it was not confident that there would be an adequate need for additional pipeline capacity. FERC therefore imposed an unusual rate structure in which revenues would increase

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[2] See *Colorado Interstate Gas Co.*, 25 FERC (CCH) ¶ 63,012 (Oct. 18, 1983); 27 FERC (CCH) ¶ 61,315 (May 25, 1984); 28 FERC (CCH) ¶ 61,083 (July 23, 1984); 29 FERC (CCH) ¶ 61,124 (Oct. 31, 1984); 31 FERC (CCH) ¶ 61,325 (June 19, 1985).

sharply, but only as the amount of gas flowing through the system (or "throughput") increased, thereby placing on the pipeline owners the risk that demand projections would not be met. The Trailblazer System cost $500 million to build, 70 percent of which was financed through debt. The debt was guaranteed by long term contracts allocating the pipeline's capacity for the useful life of the pipeline. NGPL assumed the lion's share of this debt, roughly 50 percent, and consequently received control over roughly 50 percent of the capacity of the system.[3] *Id.* at 51a.

The Trailblazer System began transporting gas in late 1982. NGPL soon found that throughput and consequently revenues were far less than had been projected. There was little prospect for increasing the flow of gas in the system because consumption patterns made an increase in demand for gas unlikely. Indeed, NGPL saw that under ordinary competitive conditions the Trailblazer System could not draw business away from other pipelines because, as a new pipeline built at high cost, it was forced to charge significantly higher transportation rates than those of established, fully amortized pipelines, including CIG's line. App. 75b. NGPL's anticompetitive response to this economic predicament formed the basis for this lawsuit.

5. *Monopolistic and "reprehensible" conduct and market effects.* NGPL responded to this predicament with "reprehensible conduct" (App. 19a) that lacked any legitimate business justification: It manipulated its gas purchases so as to exclude CIG from the market for transporting natural gas, leaving Wyoming producers no

[3] NGPL's substantial capacity control gave it the chief interest in the Trailblazer System. Although CIG owned one of the three segments of the Trailblazer System, App. 17a n.14, it assumed a much smaller percentage of the debt and therefore controlled far less of the System's capacity than did NGPL. CIG had no control over any pipeline capacity east of Cheyenne, and no control whatsoever over NGPL's use of its capacity, even on the segment owned by CIG.

choice but to use the higher-priced Trailblazer System. *Id.* at 38a-40a, 57a-58a. Beginning in July 1983, NGPL refused to purchase and accept delivery of gas from CIG. This refusal had the effect of tying up roughly half of CIG's long-distance transportation capacity because both the Service Agreement and the NGA required CIG to reserve this capacity for NGPL in the event NGPL resumed purchases. *Id.* at 23a. NGPL then took additional steps to further its scheme to exclude CIG from the market. First, NGPL deliberately interrupted CIG's attempts to provide transportation for new customers by making strategically timed demands for gas from CIG. *Id.* at 19a, 38a-39a. Second, NGPL refused to take advantage of CIG's offer to "renominate" a lower minimum purchase requirement.[4] In the normal course of business, a buyer incurring F-1 fixed costs for gas not taken would leap at the chance to decrease or eliminate those costs; NGPL, however, "chose to nominate the same volumes," which perpetuated the tie-up and thus "prevent[ed] CIG from offering a low-cost transportation alternative." *Id.* at 58a, 18a-19a. Finally, by immediately and permanently replacing CIG's gas with gas that was *more expensive*, NGPL demonstrated that its purpose in refusing to purchase CIG's gas was not to switch to a lower-priced source of gas (in accordance with the policy of Order No. 380). *Id.* at 56a. Instead, NGPL's purposes were to eliminate a lower-cost competitor and force suppliers to pay the Trailblazer System's supracompetitive prices. *Id.* at 54a-58a.

NGPL's predatory conduct forced CIG to relinquish its rights to purchase gas from several suppliers, including its largest, Champlin Petroleum, which then had to use the higher-priced Trailblazer System. *Id.* at 62a. Other suppliers that attempted to use CIG's pipeline had

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[4] Under CIG's FERC-approved tariff, any customer could renominate a lower minimum purchase volume, but only if another customer were willing to purchase the difference. In this instance, CIG waived this provision in order to facilitate renomination.

their service interrupted by NGPL's strategically timed purchase demands, which forced them to use the higher-priced Trailblazer System. *Id.* at 39a. By the time the filing of CIG's lawsuit halted NGPL's gas acquisition tactics, NGPL had managed to increase Trailblazer's share of the market for long-distance transportation of Wyoming gas from 41% to 54%, while CIG's fell from 23% to 10%. *Id.* at 52a. More important still, NGPL's predatory tactics left Trailblazer as the "one transportation alternative for Wyoming natural gas" (*id.* at 39a), because the other Wyoming pipelines were tied-up (CIG), or full-to-capacity as a consequence of CIG's tie-up (Northwest Pipeline), or not available because they stopped short of the Overthrust region. *Id.* Consequently, NGPL's actions harmed the market as well as CIG: suppliers and shippers that needed long-distance transportation were forced to use Trailblazer and were forced to pay "supracompetitive prices" (*id.* at 27a) that were then passed on to consumers. *Id.* at 40a-41a.

B. Proceedings Below

1. CIG filed this lawsuit in the United States District Court for the District of Wyoming, alleging that NGPL had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas, had breached its contract, had breached its duty to perform on the contract in good faith, and had tortiously interfered with CIG's contract with Champlin. After an eight-week trial, the jury returned a verdict for CIG on all counts.

NGPL's motion for judgment NOV was denied. The district court found that substantial evidence supported the jury's verdict that NGPL had violated its contractual duty of good faith and fair dealing. *Id.* at 69a-73a. On the attempted monopolization claim, the district court ruled that (1) "[t]he jury could have concluded that competition actually diminished" (*id.* at 39a); (2) "a lower-priced competitor was excluded in

favor of a higher-priced competitor without a corresponding increase in allocative or productive efficiency" (*id.* at 40a); and (3) "CIG's exclusion resulted in higher prices to producers, shippers, and consumers of natural gas." *Id.* The district court also recognized that CIG had proven a dangerous probability of successful monopolization by showing that NGPL had in fact *succeeded* in exercising monopoly power:

> The weight of the evidence supports the jury's finding that *NGPL possessed the power to control prices and exclude competition.* That evidence showed NGPL's aggressive conduct, CIG's exclusion from the market, the market's vulnerability to increases in transportation prices and that *prices actually increased.* This constitutes sufficient evidence from which the jury could conclude that CIG proved a dangerous probability of success by a preponderance of the evidence.

Id. at 52a-53a (emphasis supplied).[5]

2. The court of appeals reversed on all but the tortious interference claim. Relying in part on an *amicus* brief submitted by FERC, the court held that FERC's general rulings on minimum bill provisions and its rulings specifically on the provisions in the Service Agreement preempted CIG's claim for simple breach of contract. *Id.* at 4a-9a.

The court of appeals also held preempted CIG's independent claim that NGPL breached its duty to perform in good faith. It based this preemption on an *inference* that

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[5] The jury found each of the four elements of attempted monopolization as defined in the Tenth Circuit: a relevant market, specific intent to monopolize, a dangerous probability of success, and conduct in furtherance of the attempt. App. 52a-53a. On one of these factors, a dangerous probability that the attempt would succeed, the jury was instructed that "a firm must possess market strength—market strength that approaches monopoly power; that is, the ability to control prices and exclude competition." Jury Instr. No. 33 (Doc. 574).

FERC would have intended to draw a line between "actions based upon tort" and "actions based upon contract," and to preempt all contract-based claims. *Id.* at 14a. The court of appeals acknowledged that it had no direct evidence of FERC's preemptive intent: FERC in its prior rulings "was not explicitly confronted" with this particular contract claim, *id.* at 11a, and FERC in its *amicus* brief "did not distinguish between the breach of contract damages awarded for bad faith failure to purchase gas and those awarded for failure to purchase gas under Section 2 of the Service Agreement." *Id.* at 12a.[6] Nevertheless, the court believed that it could infer the tort/contract distinction from FERC orders "in a closely analogous context," *id.*, and that inferred preemption was appropriate because FERC's orders "must have room to breathe." *Id.*

The court of appeals also reversed the jury's verdict of attempted monopolization. The court had no illusions about the reprehensible nature of NGPL's actions:

> Natural's predatory conduct consisted of exercising its contract rights with CIG to prevent CIG from offering transportation service to long distance customers. Because Natural reserved a certain amount of space in CIG's pipeline, CIG could not offer that space to others. By continuing to reserve large amounts of gas and taking gas when CIG threatened to sell Natural's capacity, Natural insured that CIG could not offer Natural's reserved capacity to the market.

Id. at 23a. The court recognized that this predatory conduct had enabled NGPL both to increase the Trailblazer System's market share to 54% *and* "to charge supra-competitive prices." *Id.* at 27a. Nevertheless, the court of appeals held this evidence insufficient to support a claim of attempted monopolization. Such a claim, the court

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[6] In fact, FERC in its *amicus* brief specifically declined "to take a position *vel non* on the propriety of the conduct in which the jury found Natural engaged." FERC Br. at 11.

held, requires a showing that defendant is likely to achieve a higher market share than 54%, typically "between 70% and 80%." *Id.* at 21a-23a & n.18. The court also rejected the claim because "the Trailblazer System's ability to charge supracompetitive prices" would likely last only six years, at which point "the Trailblazer System would be helpless to compete against the unused and inexpensive capacity of CIG's system." *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision to oust the entire body of state contract law simply because FERC orders have modified part of a contract is an extraordinary ruling that conflicts with several Fifth Circuit decisions and with controlling principles of preemption law established by this Court. These conflicts are particularly significant because of the substantial number of contracts periodically modified or affected by actions of regulatory agencies such as FERC. See App. 5a n.1.

The Tenth Circuit's antitrust ruling is more astonishing still. The panel expressly stated not only that NGPL excluded a lower-priced competitor from the market, but that it forced suppliers to pay "supracompetitive prices." The panel's willingness to tolerate admittedly "predatory conduct," whose demonstrated anticompetitive market effects will persist for at least six years, simply because the predator is unlikely to reach a target market share and would lose its ability to charge such prices within a finite period of time is unprecedented. The decision conflicts with at least two lines of court of appeals' decisions as well as with basic antitrust principles established by this Court, and it compounds the chronic disarray among the lower courts in addressing attempted monopolization claims under Section 2. Both the preemption and the antitrust issues are clearly presented by the opinion and facts below, and each independently merits review by this Court.

I.

1. The Tenth Circuit's preemption holding squarely conflicts with the Fifth Circuit's decision in *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). In *Gulf States*, the Fifth Circuit held that a utility's claim for "breach of an independent duty to act in good faith" was not preempted by the Federal Power Act or by the filed rate doctrine. *Id.* at 1469, 1474. Although the court acknowledged that "[t]he FPA also preempts *some* private causes of action for breach of contract" (*id.* at 1471, emphasis added), it explained that these would be cases in which recovery of damages would conflict with FERC's exclusive authority to set rates. *Id.* at 1471-72. In *Gulf States*, however, the claim was that "good faith negotiations would have reduced the *amount purchased* (not the rate)," and the court therefore ruled that "[t]his claim would not be preempted by the FPA." *Id.* at 1471 (emphasis in original). Indeed, the court noted that the FERC itself had refused to assert jurisdiction over this particular breach of contract claim. *Id.* at 1469, 1470-74 & n. 7.[7]

Like the claim in *Gulf States*, petitioner's claim is that NGPL's bad faith caused NGPL to reduce the amount of gas it purchased from petitioners. As in *Gulf States*, an award of damages for NGPL's bad faith would in no

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[7] Similarly, in *United Gas Pipe Line Co.* v. *FERC*, 824 F.2d 417, 430 (5th Cir. 1987), the court of appeals affirmed FERC's ruling that its curtailment orders did not shield a seller from contract liability for its own fault in creating a need to curtail gas deliveries. In so ruling, the court reaffirmed a line of earlier Fifth Circuit decisions dating from 1973 that reached the same conclusion. *International Paper Co.* v. *FPC*, 476 F.2d 121, 125 (5th Cir. 1973) (vacating FPC opinion that suggested that compliance with an FPC-approved curtailment tariff would constitute "an absolute defense" to *all* damage actions based on breach of contract); *id.* at 131 (concurring opinion); *Louisiana* v. *FPC*, 503 F.2d 844, 865-69 (5th Cir. 1974) (following *International Paper*); cf. *Monsanto Co.* v. *FPC*, 463 F.2d 799, 808 (D.C. Cir. 1972).

way conflict with FERC's orders or with FERC's exclusive right to set rates under the filed rate doctrine. Damages for bad faith are calculated simply by determining the amount of gas NGPL would have purchased absent bad faith, at the filed rates for gas actually purchased (both F-1 and H-1), less expenses saved because of the breach.[8]

The Fifth Circuit's rulings highlight the basic error that underlies the Tenth Circuit's analysis: It is irrelevant to a determination of preemption in this context whether a state law claim is denominated as sounding in contract or in tort. What is dispositive is the *conduct* the state is regulating, not the "label" the state uses in regulating that conduct. *United Gas Pipeline Co.*, 824 F.2d at 429; accord *New Orleans Public Service, Inc.* v. *Council of New Orleans*, 109 S.Ct. 2506, 2517 (1989); *Gulf States Utilities*, 824 F.2d at 1471; *United Gas Pipeline Co.*, 4 FERC ¶ 61,151 at 61,351 (Aug. 9, 1978) (App. 51b, 55b).[9] Furthermore, by "drawing a line" be-

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[8] The Tenth Circuit's concern, although never clearly expressed, apparently arises because CIG sought to calculate damages for gas not taken at both the F-1 and the H-1 rate. It is true that, in addressing the calculation of damages for a simple breach of the minimum purchase requirement, FERC limited CIG to recovery at the F-1 rate. But in so holding, FERC did not preclude CIG from seeking to be made whole for damages caused by NGPL's failure in bad faith to purchase gas. The proper damages remedy for such a breach (and the damages CIG sought) is simply to put CIG in the position it would have been had NGPL not refused to purchase gas in bad faith, and that in turn requires compensation at both the F-1 and H-1 rates, less variable costs and expenses saved because of the breach. Since both the F-1 and the H-1 rates are part of a FERC-approved tariff, using them to calculate damages in no way "interferes" with FERC's exclusive jurisdiction to set rates.

[9] The Tenth Circuit simply misread the Fifth Circuit's decision in *United Gas Pipe Line Co.* as holding that "FERC orders prohibiting suits based upon breach of contract . . . also forbid suits based upon breach of the contractual obligation of good faith and fair dealing." App. 13a-14a n.11. Read in context it is clear that the Fifth Circuit preempted only those "good faith" claims

tween contract and tort, the panel's decision stands as a precedent for preempting not only claims of bad-faith breach but the whole panoply of contractual claims and defenses. Compare, *e.g.*, *Gulf States Utilities*, 824 F.2d at 1472 (refusing to preempt contractual defense of frustration). Because such claims and defenses regularly arise in litigation over contracts approved by FERC, and because the state law preempted here is traditionally of special concern to the states,[10] the panel's tort-contract distinction constitutes a fundamental error of broad significance that this Court should correct.[11]

2. The Tenth Circuit's decision also conflicts with basic preemption principles established by this Court. Although the Court has been willing in the past to infer preemption where *Congress* has not expressly stated its intent to preempt,[12] the Court has repeatedly refused to find that *agency* action has preempted state law absent either a clearly stated administrative intent to preempt or

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that, despite their name, were founded in substance on a simple breach of contract rather than on affirmative misconduct. 824 F.2d at 429. In fact, United itself conceded that it would be liable for damages "when a customer proves United's bad faith or willful misconduct." 824 F.2d at 426.

[10] *E.g.*, *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 663 (1961); *Aronson* v. *Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979).

[11] This Court recognized but declined to reach the question whether preemption of a simple breach of contract claim would also require preemption of a contract claim based on "affirmative misconduct" in *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 583-84 & n.13 (1981) ("*Arkla*"). The Court's decision to leave this question open in *Arkla* is particularly significant because the problem left open in *Arkla* is harder than the issue presented here: In *Arkla*, unlike this case (see note 8, *supra*), damages for defendant's misconduct would necessarily have been calculated at a rate never filed with FERC.

[12] *E.g. Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 143 (1982).

an actual conflict between agency requirements and state law. In *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), the Court explained its reluctance to infer preemptive intent from circumstantial evidence such as the comprehensiveness of agency actions:

> As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. . . .
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> Moreover, because agencies normally address problems in a detailed manner and can speak through a variety of means . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to preempt.

Id. at 717-18.[13]

In this case, the court of appeals did not "pause"; it leapt to the conclusion that preemption could be inferred. It did so despite its own acknowledgment that FERC had never addressed the issue either in its orders or even through an *amicus* brief, and it refused to solicit FERC's views on this issue despite petitioner's express request in seeking rehearing that the court do so.[14] The Tenth Cir-

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[13] See also *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 583-84 (1987) (no preemption where regulations were "devoid of any expression of intent to preempt state law"); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 705 n.10 (1984) (preemption upheld because agency's "preemptive intent could not be more explicit or unambiguous" and state law "plainly conflicts"); *Fidelity Federal Sav. & Loan Ass'n.* v. *De la Cuesta*, 458 U.S. 141, 154-59 (1982) (preemption upheld because agency's preemptive intent "is unambiguous").

[14] Compare *Distrigas of Massachusetts Corp.* v. *Boston Gas Co.*, 693 F.2d 1113, 1118-19 (1st Cir. 1982) (FERC's intent "can be

cuit believed that it was free to infer FERC's views by reasoning from FERC decisions "in a closely analogous context." App. 13a. In so doing, the court erred not only in inferring preemption from agency silence, but in erroneously interpreting what FERC has previously held. Both the decision on which the panel chiefly relied,[15] as well as numerous decisions that the panel did not cite,[16]

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answered fully and quickly through amicus participation" by FERC).

[15] See *Transcontinental Gas Pipe Line*, 35 FERC (CCH) ¶ 61,043 at 61,080 (April 7, 1986) (App. 30b, 43b) ("[A] pipeline's adherence to effective curtailment tariffs would be a defense to pure contract damage claims, but . . . the pipeline could nevertheless be liable for damages flowing from its role in creating the situation that resulted in curtailments"); *id.* at 45b-46b (same); *id.* at 49b (same); see also *Transcontinental Gas Pipeline Corp.*, 35 FERC (CCH) ¶ 61,340 at 61,783 (June 16, 1987) (App. 23b, 28b) (on rehearing) ("As indicated in Opinion No. 248, *recovery of damages for breach of contract* (or other contract-based cause of action, such as promissory estoppel) arising out of curtailment *will be prevented* by a pipeline's adherence to an approved curtailment plan in administering curtailments, *unless there is a showing of negligence or misfeasance* in causing the shortages that result in having to resort to use of the curtailment plan") (emphasis added, footnotes omitted). Although the Commission in *Transcontinental Gas* did not explicitly state that "bad faith performance" is to be deemed a subset of "misfeasance," it has taken precisely this position in a host of other analogous decisions. See note 16, *infra*.

[16] See, *e.g.*, *Southern Company Services, Inc.*, 37 FERC (CCH) ¶ 61,256 at 61,652 (Dec. 15, 1986) (App. 1b, 14b) (refusing to accept jurisdiction over contractual claim for breach of good faith duty and explaining that such a claim "is not one which appears to implicate technical expertise, nor is it one which is central to our regulatory responsibilities"); *United Gas Pipe Line Co.*, 4 FERC (CCH) ¶ 61,151 at 61,351 (Aug. 9, 1978) (App. 51b, 55b-56b) ("in cases involving negligence, *bad faith* or wrongful conduct on the part of a pipeline, *the Commission has no power to adjudicate contract liability*, and that such liability must be determined by the courts") (emphasis added); *United Gas Pipe Line Co.*, 49 FERC (CCH) ¶ 61,096 at 61,443 & nn.71-72 (Oct. 27, 1989) (curtailment order limits breach of contract liability only in "the absence of negligence, *bad faith*, fault or willful misconduct") (emphasis

establish conclusively that FERC has never drawn a tort/contract distinction and has repeatedly held that its orders modifying contracts do not preempt contract claims for breach of a good faith duty or other affirmative misconduct. This case thus well-illustrates the danger of basing preemption solely on an *inference* of agency intent.

3. Finally, the case merits review because the Tenth Circuit's holding that agency orders must be given "room to breathe" is fundamentally misguided and pernicious. App. 12a. Finding a need for breathing room is no substitute for finding an actual conflict.[17] The Tenth Circuit neither found an actual conflict, nor could it reasonably have done so: The fact that FERC limited recovery for simple breach of contract to calculations at the F-1 rate has no bearing on the separate state law claim for bad faith performance; all that matters is that dam-

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added); *United Gas Pipe Line Co.*, 35 FERC (CCH) ¶ 61,344 at 61,791-61,792 (June 17, 1986) (same); *United Gas Pipe Line Co.*, 31 FERC (CCH) ¶ 61,336 at 61,768 (same); *United Gas Pipe Line Co.*, 49 FPC 1211, 1221 (1973) (same).

[17] *E.g.*, *California Coastal Comm'n*, 480 U.S. at 594. The cases on which the Tenth Circuit relied for its breathing room theory (App. 10a-12a) are inapposite because each involved either a direct conflict between agency action and state law or a state agency or court addressing a question expressly decided by an agency. See *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 579-84 & n.13 (1981) (preempting "simple breach" of contract because FERC had directly ruled on it and because such damages would amount to a "retroactive rate increase[]" that Congress intended to preempt); *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 973 (1986) (preempting state power commission's allocation order because it "conflict[ed] with FERC's orders"); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324, 326-330 (1981) (preempting state law because it was "inconsistent" with regulatory scheme and because agency had expressly declined to provide the requested relief); *see also Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465, 1470-71 (5th Cir. 1987) (*Arkla* and *Nantahala* do not require preemption of contract claim for breach of good-faith duty).

ages for the latter claim are calculated, as they were here, according to FERC-approved rates.[18]

Far from protecting the integrity of FERC orders, the Tenth Circuit's rule undermines it by giving parties whose contracts are modified by agency actions a license to engage in affirmative misconduct without fear of common law sanctions. FERC's specific purpose here—to encourage competition by reducing the economic disincentive of buyers to switch to lower-priced gas and thus reduce consumer's costs—was defeated by respondent's decision to switch to *higher* priced gas in order to tie up a competitor's pipeline and divert gas onto a higher-priced pipeline system, thereby raising costs to suppliers and consumers. Holding a pipeline liable under state contract law for such misconduct would further FERC's primary regulatory goals of protecting consumers, decreasing regulatory oversight, and fostering competition.[19]

II.

The Tenth Circuit's antitrust ruling is equally worthy of this Court's review. The panel's ruling places the

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[18] See note 8, *supra*. On rehearing, respondents did not attempt to defend the panel's tort-contract distinction, but did argue that petitioner had effectively waived this claim by having urged the courts below to calculate damages solely at the H-1 rate (minus variable costs). Respondents' waiver theory was not adopted by the Tenth Circuit, and therefore cannot serve to limit the controlling impact of the decision below on subsequent cases. Moreover, the assertion is absolutely wrong. Petitioner has always sought to calculate the damages for gas that NGPL would have purchased absent NGPL's bad faith at the full commodity rate, which includes both the H-1 and F-1 schedule. The jury was instructed to calculate damages as "the profit that Colorado Interstate would have made if Natural had fully performed, together with any incidental damages, but less expenses saved because of the breach." Jury Instr. No. 45 (Doc. 574).

[19] See, *e.g.*, Order No. 380, *supra*; *Tennessee Gas Pipeline Company* v. *Pan Canadian Petroleum Co.*, 38 FERC (CCH) ¶ 61,236 at 61,749 (Mar. 10, 1987) ("the NGPA mandates less regulatory intrusion into private contractual arrangements. Consideration by the courts . . . [of] breach of contract suits by producers is consistent with the Commission's role and regulatory policies under the NGPA").

Tenth Circuit in conflict with other courts of appeals, exacerbates longstanding confusion over the legal standard for attempted monopolization, and fundamentally misconceives Section 2 and the role of economic analysis in antitrust law.

1. The Tenth Circuit's antitrust analysis and holding conflicts with the Fifth Circuit's decision in *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). In *Associated Radio*, the court of appeals affirmed a jury verdict of liability under Section 2 in a case where defendant, through a series of exclusionary acts, had expanded its market share to 50% while at the same time it had raised prices. 624 F.2d at 1352-57 & nn.18, 22, 25. The court of appeals expressly considered and rejected the same two arguments that the Tenth Circuit found controlling. It acknowledged that a 50% market share was lower than the share "in some cases that find actual monopolization," but found such a share sufficient when "viewed alongside the evidence of the number of actual competitors, the high barriers to entry, . . . and [defendant's] power over price." *Id.* at 1357. In addition, the court expressly rejected the argument that defendant's exclusionary conduct amounted to a mere business tort because it found that the conduct caused "significant and more-than-temporary harmful effects on *competition*, shown in part by the rise in prices charged to customers." *Id.* at 1354 (citing III P. Areeda and D. Turner, *Antitrust Law*, ¶ 737b at 278 (emphasis in original)). The Fifth Circuit concluded that proof of exclusionary conduct that allows a defendant to increase market share to 50% and to raise prices is sufficient to support a jury verdict of either attempted monopolization or monopolization under Section 2. *Id.* at 1357-58 n.25.

This case conflicts directly with *Associated Radio*, because the Tenth Circuit concluded that the same crucial facts that constituted a violation of Section 2 in *Associated Radio*—predatory conduct, market share of 50%, ability

to charge supracompetitive prices for several years—amounted to a mere business tort here. Had this case been brought in the Fifth Circuit, petitioner would have prevailed.

Petitioner recognizes, as did the court in *Associated Radio*, that it is important to distinguish between exclusionary conduct that amounts to a mere business tort and exclusionary conduct that violates Section 2. But the line that the Tenth Circuit drew between those two cannot be the correct one. As the Fifth Circuit understood, exclusionary conduct that harms only a competitor may properly be deemed merely a business tort; exclusionary conduct that also has anticompetitive effects on the market—increased prices due not to increases in efficiency or quality but to the exclusion of a lower-cost competitor—violates Section 2. 624 F.2d at 1352-57; cf. *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1416-17 (7th Cir. 1989) (rejecting attempted monopolization claim where ability of defendant ever to charge "supracompetitive prices" was at best "a risky assumption"). The conflict posed here thus goes to the heart of Section 2, and therefore merits review by this Court.

2. The Tenth Circuit's holding that proof of a likely achievement of a high market share is an essential element of an attempted monopolization claim also conflicts with the standard for attempted monopolization employed by the Ninth and Eighth Circuits, as well as with the reasoning employed by other courts. The Ninth Circuit has long endorsed the rule that "an attempted monopoly violation can be found with evidence of conduct alone," *Twin City Sportservice Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1309 (9th Cir.) *cert. denied*, 459 U.S. 1009 (1982), and has employed "a flexible approach toward the 'mix' of conduct, actor, and market conditions" in evaluating attempted monopolization claims. *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). This approach was

recently endorsed by the Eighth Circuit. *H.J., Inc.* v. *ITT*, 867 F.2d 1531, 1543 (8th Cir. 1989) (following *Twin City*). Moreover, while not adopting the Ninth Circuit's approach, the Second Circuit has stated that proof of market share is not "invariably a requirement of a monopolization claim," and is unnecessary where there is "unambiguous evidence that the defendant has power to control prices or exclude competition." *Broadway Delivery Corp.* v. *United Parcel Serv.*, 651 F.2d 122, 130 (2d Cir.), *cert denied*, 454 U.S. 968 (1981).

Under the standards employed in these circuits, the jury verdict in this case would necessarily be affirmed. The record here not only demonstrates the kind of exclusionary conduct that "inevitably harms competition," *Hunt-Wesson*, 627 F.2d at 925, but also supports a finding that NGPL had the "power to control prices" and did in fact control them. *Broadway Delivery*, 651 F.2d at 130.

3. The Court should address these circuit conflicts. The conduct proven in this case is undoubtedly sufficient to make out a violation of Section 2 in some circuits but not in the Tenth, and the conflict in the lower courts is both persistent and substantial.[20] The last attempted monopolization case decided by this Court was *Lorain Journal* v. *United States*, 342 U.S. 143 (1951), where the Court affirmed a judgment of attempted monopolization without inquiring whether the evidence would support a dangerous probability of success or would show a likelihood of achieving a high market share. Other Section 2 decisions raise, at the very least, a serious question whether this Court would conclude that proof of a high market share is invariably a prerequisite for section 2 liability. *E.g.*, *Walker*

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[20] See generally Ponsoldt, *Clarifying the Attempt to Monopolize Offense as an Alternative to Protectionist Legislation: The Conditional Relevance of "Dangerous Probability of Success,"* 61 Notre Dame L. Rev. 1109, 1110, 1112, 1144 (1986) ("few areas of antitrust law have produced wider disagreement among courts and commentators than the proscription against attempts to monopolize contained in Section 2 of the Sherman Act").

Process Equip., Inc. v. *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965) (reversing the dismissal of a complaint alleging attempted monopolization to allow consideration whether anticompetitive conduct may constitute a "per se" violation of Section 2); *United States* v. *Griffith*, 334 U.S. 100, 107 (1948) ("It is indeed 'unreasonable, *per se*, to foreclose competitors from any substantial market'"); cf. *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602-03, 608-11 (1985) (exclusionary conduct without efficiency justification is "predatory"). See generally III P. Areeda & D. Turner, *Antitrust Law* ¶ 836 (1978) (describing types of conduct sufficient to prove violation of Section 2 without any showing of market power).

4. Review is also appropriate because the Tenth Circuit has decided questions of substantial importance to federal antitrust enforcement in ways that conflict with the positions of the Department of Justice. The panel held that predatory conduct with demonstrated anticompetitive market effects (raising prices to supracompetitive levels) is not actionable under the antitrust laws unless the predator can sustain such pricing over some indefinite period longer than six years. App. 25a-28a & n.23. This unprecedented holding is flatly inconsistent with the Department's Merger Guidelines, which state that the Department will challenge a merger that allows a price increase for two years or longer, 49 Fed. Reg. 26,823, 26,832 (1984). A realistic hypothetical illustrates the Tenth Circuit's error: If an American industry were completely protected from foreign competition by a tariff that was due to expire in six years, no court would hold that the temporal limitation excused a merger of the American firms to achieve supracompetitive profits for those six years.

Similarly, the Department of Justice's standard for proving attempted monopolization is that proof of unambiguously anticompetitive conduct alone is sufficient:

> [T]he 'dangerous probability' test can be met by showing *either* that the attempt would succeed in establishing a monopoly *or* that the defendants had engaged in truly abusive or predatory conduct that has no independent economic justification. The Department has previously taken the position that conduct which is predatory or clearly without economic justification should be held to violate Section 2, and some lower appellate courts have indicated a willingness to infer 'dangerous probability' from the exclusionary nature of the conduct itself.

Tire Company Cases—U.S. Information Memorandum, 1976 Trade Reg. Rep. (CCH) ¶ 50,259 at 55,502 (Feb. 23, 1976) (emphasis added). Had the Tenth Circuit applied the Department's standard, it would have affirmed the jury verdict.

5. Perhaps the most fundamental reason for granting certiorari, however, is that the court of appeals' antitrust ruling rests on analytic errors that must be corrected if Section 2 is to be properly understood and enforced. The panel erred not only in holding that six years of supracompetitive pricing caused by predatory conduct was insufficient to support a Section 2 verdict, but in confusing a mere indicator of monopoly power (market share) with monopoly power itself. This Court has defined monopoly power as "the power to control prices or exclude competition." *United States* v. *E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The district court found, and the court of appeals confirmed, that respondent excluded a low-cost competitor from competing in the market and expanded Trailblazer's market share while forcing customers (producers) to pay supracompetitive prices. App. 27a, 40a-41a. This, plainly and simply, *is* the exercise of monopoly power. *E.g.*, *Associated Radio*, 624 F.2d at 1352-57; *Broadway Delivery*, 651 F.2d at 130.

The court of appeals missed this point because it believed, erroneously, that a necessary condition for the exercise of monopoly power is the achievement of a very

high market share (*e.g.*, 70% to 80%). As many courts and commentators have recognized, however, "the size of a regulated company's market share should constitute, at most, a point of departure in assessing the existence of monopoly power. Ultimately, that analysis must focus directly on the ability of the regulated company to control prices or exclude competition." *MCI Communications Corp.* v. *AT&T Co.*, 708 F.2d 1081, 1107 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). See *e.g.*, *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528 (1948) ("The relative effect of percentage command of a market varies with the setting in which that factor is placed"); *Broadway Delivery*, 651 F.2d at 128 ("As the cases and commentators have cautioned, . . . the true significance of market share data can be determined only after careful analysis of the particular market"); L. Sullivan, *Antitrust* 38 (1977) (focusing solely on market share becomes a serious mistake when it "get[s] in the way" of "a more direct concern with [monopoly] power"). Accordingly, the Second and Fifth Circuits have held that a 50% share or less is sufficient to sustain a verdict of monopolization,[21] and other courts have held that attempted monopolization may be found with market shares less than 50%.[22]

If the court of appeals had properly focused its attention on the fundamental question under Section 2—whether defendant attempted to achieve or exercise the power to exclude competition and control prices—it would

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[21] See *Hayden Publishing Co.* v. *Cox Broadcasting Co.*, 730 F.2d 64, 68-69 & n.7 (2d Cir. 1984) ("a party may have monopoly power . . . even though its market share is less than 50%"); *Broadway Delivery Corp.*, 651 F.2d at 130 (same); *Associated Radio*, 624 F.2d at 1352 & n.18.

[22] *Twin City Sportservice Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1301, 1309 (9th Cir.) (24%), *cert. denied*, 459 U.S. 1009 (1982); *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598-99 (7th Cir. 1971) (33%), *cert. denied*, 405 U.S. 1066 (1972).

have concluded that under its own stated view of the case the jury's verdict required affirmance. The market share figures on which the panel focused are not simply an indicator of potential monopoly power, but a *measure of the extent to which NGPL succeeded in garnering monopoly power.*[23] The Tenth Circuit expressly recognized that NGPL, by its "tie up of CIG's pipeline capacity," succeeded in "shift[ing] 13% of the market to the Trailblazer System" and forcing customers to pay "supracompetitive prices." App. 23a, 27a. This is nothing less than a demonstration of both attainment and exercise of monopoly power. Moreover, the 54% share attributed to Trailblazer here understates Trailblazer's actual power, because NGPL's predatory tactics left Trailblazer as the "one transportation alternative for Wyoming natural gas." *Id.* at 39a. As the only pipeline with available capacity, Trailblazer effectively had 100% of the market for new transportation services, and was free to impose its supracompetitive prices on suppliers and shippers. See generally, Fisher, *Diagnosing Monopoly*, 8 Q. Rev. Econ. & Bus. 7 (1979).

This Section 2 case therefore presents this Court with the same problem posed by the court of appeals' analysis of Section 1 in *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447 (1986). In that case, the FTC's order had been set aside for failing adequately to define the relevant market and to show that defendants actually had sufficient market power to restrain competition. This Court held, however, that proof of actual adverse effects on competition obviated the need for precise market definition or a showing of market power:

> Since the purpose of the inquiries into market definition and market power is to determine whether an

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[23] *E.g.*, Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 974 (1981) ("if a buyer complains that his seller violated Section 2 of the Sherman Act by monopolizing, he is alleging implicitly that the seller did something to increase his market share").

> arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' . . . In this case, we conclude that the finding of actual, sustained adverse effects on competition . . . is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.

476 U.S. at 460-61. By focusing only on proof relating to one of the indicators of monopoly power while ignoring the proof "of actual, sustained adverse effects on competition," the Tenth Circuit committed the same error as did the Seventh Circuit in *Indiana Federation of Dentists*. This fundamental principle underlying Section 1 should be held equally applicable to Section 2. See *Broadway Delivery*, 651 F.2d at 130 ("We do not suggest that evidence of market share is invariably a requirement of a monopolization claim . . . [because it is sufficient to] produce unambiguous evidence that the defendant has the power to control prices or exclude competition").

Indeed, the Tenth Circuit's error in this case is even more stark than was the error in *Indiana Federation of Dentists*. In this case petitioner not only proved anticompetitive effects but also provided "an elaborate market analysis" (476 U.S. at 461) that explained why respondent was able to achieve and exercise such power. The market for long-distance transportation of Wyoming natural gas is precisely the type of concentrated market with high entry barriers that makes it possible for a dominant firm with over 50 percent of the market to exercise monopoly power.[24] Elasticity of demand was low

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[24] See *Maryland People's Counsel* v. *FERC*, 761 F.2d 780, 784-85 (D.C. Cir. 1985) (discussing "monopoly power of pipelines"); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 959 (1981) ("When the elasticities of demand and supply are both high, a market share well above 50% is necessary to

because, for producers of natural gas in Wyoming, there were no close substitutes for pipeline transportation as a means of getting their product to the marketplace. In addition, barriers to entry in the form of a new pipeline were quite high (or, put another way, supply was inelastic). This case thus illustrates clearly why a proper market analysis requires consideration of factors other than market share.

* * * *

Commentators may debate the merits of deregulating the natural gas industry, but no one has proposed that courts pursue deregulation by exempting pipelines from the antitrust laws or traditional state common law. The court of appeals' holdings on both preemption and antitrust flatly conflict with numerous decisions of the court of appeals and of this Court. These conflicts are substantial and persistent, and the underlying issues are national in scope. Accordingly, this Court should grant the petition.

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confer appreciable market power. *When either demand or supply elasticity is low, a smaller market share confers the same power*"). As the ABA Antitrust Law Task Force recently explained, "the [Antitrust] Division should investigate possible Section 2 Sherman Act cases: . . . [in] industries where market imperfections may have resulted from the structure of the industry or from governmental regulation." *Report of the ABA Antitrust Law Task Force on the Antitrust Division*, 57 Antitrust & Trade Reg. Rep. (BNA) No. 1425 at S-4 (July 19, 1989).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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89-1508

No. 89-——

SUPREME COURT, U.S.
FILED
MAR 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPE LINE COMPANY OF AMERICA and NGPL-TRAILBLAZER, INC.,
Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 87-2109, 87-2123

COLORADO INTERSTATE GAS COMPANY,
Plaintiff/Counterclaim-Defendant/Appellee,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA;
NGPL-TRAILBLAZER, INC.,
Defendants/Counter-claimants/Appellants,

v.

WYOMING INTERSTATE COMPANY, LTD.;
the COASTAL CORPORATION,
Counterclaim-Defendants/Appellees.

MIDCON VENTURES, INC.,
Counterclaimant.

FEDERAL ENERGY REGULATORY COMMISSION,
Amicus Curiae.

Sept. 11, 1989

Michael L. Beatty of Colorado Interstate Gas Co., Colorado Springs, Colo., (Rebecca H. Noecker of Colorado Interstate Gas Company, Colorado Springs, Colo., William F. Baxter of Shearman & Sterling, Stanford, Cal., William C. McClearn, James E. Hartley, Joseph W. Hal-

pern, Elizabeth A. Phelan, and Timothy M. Rastello of Holland & Hart, Denver, Colo., J. Kent Rutledge of Lathrop & Uchner, P.C., Cheyenne, Wyo., with him on the briefs), for plaintiff/counterclaim-defendants/appellees.

Phillip Areeda, Cambridge, Mass., (William H. Brown of Brown & Drew, Casper, Wyo., Paul J. Hickey of Rooney, Bagley, Hickey, Evans & Statkus, Cheyenne, Wyo., Gerald M. Stern and Charles E. Foster, Los Angeles, Cal., Joseph M. Wells and Paul E. Goldstein, Lombard, Ill., John T. Cusack and Michael P. Padden of Gardner, Carton & Douglas, Chicago, Illinois; J. Curtis Moffatt and Paul Korman of Gardner, Carton & Douglas, Washington, D.C., Harvey I. Saferstein and Steven A. Marenberg of Irell & Manella, Los Angeles, Cal., and Louis Nizer and Paul Martinson of Phillips, Nizer, Benjamin, Krim & Ballon, New York City, with him on the brief), for defendants/counterclaimants/appellants.

Catherine C. Cook, Gen. Counsel, Jerome M. Feit, Sol., and Joshua Z. Rokach, Atty., of the F.E.R.C., Washington, D.C., for amicus curiae.

Before MOORE, ANDERSON, and BALDOCK, Circuit Judges.

JOHN P. MOORE, Circuit Judge.

This is an appeal from an order of the district court refusing to grant judgment notwithstanding the verdict or a new trial for the defendants, Natural Gas Pipeline Company of America (Natural) and NGPL-Trailblazer. 661 F.Supp. 1448. The jury awarded the plaintiff, Colorado Interstate Gas Company (CIG), $724,033,361 in damages based on CIG's claim that Natural attempted to monopolize the market for long distance transportation of Wyoming gas, breached its contract with CIG, and tortiously interfered with CIG's contractual relations. While the district court reduced the jury award to $412,237,972, Natural argues that the district court failed

to rectify the underlying legal errors on which the judgment was based.

Natural deploys a two-pronged attack against each of CIG's claims. First, it asserts that the award of damages for conduct approved by the Federal Energy Regulatory Commission (FERC) impermissibly interferes with FERC's authority to regulate gas sales and transportation markets. Second, Natural argues, in the alternative, that the substantive law of contracts, torts, and antitrust, requires the reversal of the jury's verdict on each claim. We hold that in light of FERC's orders concerning the basic issues underlying the breach of contract dispute, deference to FERC authority requires that we reverse the breach of contract verdit. We further hold that CIG failed to establish there was a dangerous probability that Natural would monopolize the long distance transportation market. Therefore, we reverse the antitrust verdict. The claim for tortious interference with contractual relations neither interferes with FERC's authority nor is substantively flawed; thus, the jury's verdict on that claim will stand.

I. *Introduction*

CIG and Natural are owners of pipelines which transport natural gas. For many years, Natural has purchased gas from CIG and transported that gas to markets in the Midwest and East. In July 1982, CIG and Natural entered into a new contract (the Service Agreement or Argeement) which obliged CIG to deliver and Natural to purchase specified quantities of natural gas. CIG sold two types of gas to Natural. Field gas was sold at a lower rate (F-1 rate) than gas which was delivered from CIG's main transmission line (H-1 rate). The contract set forth how much gas Natural was required to purchase, both on a annual and on a daily basis. Like previous service agreements between Natural and CIG, the 1982 Service Agreement also contained a minimum bill provision which allowed CIG to bill Natural at a pre-

determined rate for gas which Natural reserved but did not purchase.

Because CIG's Service Agreement with Natural involved the interstate sale of natural gas, the rates and terms specified in the Agreement required approval by FERC. When, in 1982, CIG sought FERC approval, Natural intervened to protest both the rate increase and its contractual obligation to pay CIG for gas it did not purchase. In response to Natural's intervention, FERC modified the terms of the Service Agreement to reduce the price Natural was required to pay for unpurchased gas.

In July 1983, Natural sharply reduced its gas purchases from CIG. Natural paid CIG what Natural determined to be the FERC modified rate for unpurchased gas. Natural's decrease in purchases forced CIG to stop purchasing gas from some of its suppliers: One of those suppliers, Champlin Petroleum, supplied gas to CIG from the Whitney Canyon gas fields in southern Wyoming. Although Natural claimed that it quit purchasing gas from CIG because it had an oversupply of gas, the evidence made this claim problematical. As soon as CIG ceased purchasing Whitney Canyon gas, Natural made arrangements to purchase that gas directly from Champlin. Indeed, CIG presented evidence that Natural purchased gas from many sources to replace lost volumes from CIG. This substitute gas was often more expensive than CIG's gas. On occasion, Natural resumed purchases of gas from CIG when CIG was attempting to sell gas to new customers. Natural's decision to stop purchasing gas and the losses CIG experienced as a result of that decision form the basis of this litigation.

II. *CIG's Common Law Claims*

A. Breach of Contract

The district court instructed the jury that it could find Natural breached the Service Agreement only if Natural failed to purchase gas *and* refused to pay CIG

the rate that FERC decided was appropriate for volumes not purchased. Neither party disputes that Natural refused to purchase gas. The parties dispute the rate FERC determined to be appropriate for gas not taken. Natural argues that the district court should have directed a verdict on the breach of contract claim in its favor because it paid CIG the FERC determined rate for gas not purchased. We agree.

In order to apprehend the parties' arguments on this issue, it is necessary to examine the long history of the dispute over Natural's minimum purchase obligation before FERC.[1] For many years the service agreements between CIG and Natural contained two provisions which, together, defined Natural's minimum purchase obligation.[2] Section 2 of the Service Agreement the "minimum daily take provision," required Natural to accept *each day* 90% of its General Daily Entitlement.[3] Section 4

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[1] The difficulty that CIG and Natural faced with the minimum purchase obligation was not unique. Minimum purchase obligations in gas contracts became a problem for the industry in the early 1980's, as a nationwide gas surplus forced many purchasers to curtail their takes. The huge liability incurred by purchasers forced FERC to take action on two procedural levels. First, FERC considered purchasers' objections to minimum purchase requirements on a case by case basis and modified service agreement provisions where necessary. Second, because minimum purchase obligations were widespread in the natural gas industry, FERC issued general orders that modified certain provisions in all gas contracts. thus, the conflict between CIG and Natural was just a small part of a significant problem which required FERC's continued attention.

[2] For purposes of this opinion we are using the term "minimum purchase obligation" to refer to contract terms which seek to insure that gas buyers purchase a minimum volume of gas. These provisions are sometimes called "take or pay," "minimum bill," or "minimum take" provisions. Although the precise details or mechanisms of these provisions might differ, they have similar effects.

[3] Section 2 of the Service Agreement entitled "POINTS OF DELIVERY, MAXIMUM DAILY VOLUME OBLIGATIONS, AND

of the Service Agreement, the "minimum annual bill," required Natural to purchase *each year* 90% of its Total Annual Entitlement, or pay CIG a predetermined rate for gas not purchased.[4]

Natural first objected to the minimum purchase obligation in the Service Agreement when CIG sought approval of the rates and terms of the Agreement from FERC in 1982. The reasonableness of the minimum purchase obligation was considered in administrative proceedings before an administrative law judge in 1983. The judge found the "minimum bill provisions" to be unreasonable and ordered CIG to modify the Service Agreement so that CIG could collect from Natural only the fixed costs[5] associated with the sale of gas. This decision was appealed to FERC, which, in response, modified the precise mechanism by which CIG could collect money for unpur-

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PRESSURES" includes Natural's daily purchase obligation. It states:

> Variations in daily takes may be made at Buyer's election at H-1 delivery points to meet its varying load conditions, however, Buyer shall not request total daily volumes on any day hereunder less than 90 percent of the General Daily Entitlement.

[4] Section 4 entitled "MINIMUM BILL" states, in relevant part:

> The minimum bill shall be . . . determined by multiplying the Total Annual Entitlement by a factor of 90 percent, such volume hereinafter referred to as "Minimum Volume." . . . *In the event the Buyer's actual purchases for the fiscal year are less than the Minimum Volume, then any deficiency shall be billed at the unit fixed cost component under Rate Schedule F-1* . . . .

(Emphasis added.)

[5] Fixed costs are costs which CIG must incur regardless of the volume of gas it sells. The fixed cost component of the commodity charge also includes a sum representing profits on CIG's operations. The major nonfixed (variable) cost, which CIG was forced to eliminate from the rate it could charge Natural, was the cost of gas.

chased gas but left unchanged the basic ruling that CIG could collect only fixed costs for unpurchased gas.[6]

In response to FERC's ruling, CIG submitted to FERC a modification of its Service Agreement by which it sought to collect F-1 fixed costs for F-1 gas which Natural did not purchase and H-1 fixed costs for unpurchased H-1 gas. Since the fixed cost component of gas rates included profits on the sale of gas, CIG's submitted rate would have insured full profits on unsold gas. However, FERC did not approve this rate for unpurchased gas.[7] It ruled that CIG could collect only F-1 fixed costs for whichever type of gas Natural did not purchase. CIG appealed FERC's order to this court asserting that it should collect full profits on unsold gas. We rejected this appeal. *Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803 (10th Cir.1986), *cert. denied*, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987).

CIG now argues that these extensive proceedings only considered one aspect of the minimum purchase obligation, namely, the minimum annual bill provision (Section 4) of the Service Agreement. It insists FERC simply overlooked the minimum daily take requirement (Section 2) in the individual proceedings. CIG asserts that the minimum daily take requirement was later modified by FERC's Order No. 380-C which ruled that minimum take provisions were meant to be governed by Order No. 380.

Although FERC's general orders treated minimum bill provisions identically with minimum take provisions, CIG argues that because FERC Order No. 380-C states sellers

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[6] On the same day, FERC issued Order No. 380 which required gas sellers to modify their minimum bill provisions to collect only fixed costs for unpurchased gas.

[7] FERC explained that allowing CIG to collect only F-1 fixed costs for the more expensive H-1 gas would give CIG a strong incentive to sell H-1 gas instead of merely collecting fees for undelivered gas.

may collect fixed costs,[8] CIG may collect F-1 fixed costs for unsold F-1 gas and H-1 fixed costs for unsold H-1 gas. If we were to accept CIG's argument, CIG could collect a higher rate for each year that Natural failed to purchase gas by adding up its compensation for Natural's *daily* failure to take gas than it could by using the individually tailored FERC formula for determining CIG's compensation for Natural's *annual* failure to purchase gas. Aside from the irrationality of this result, we think it ignores the fact that FERC has plainly examined both the minimum annual bill and the minimum daily take requirements in the Service Agreement since the original ALJ decision.

As noted earlier, the ALJ stated that he found that minimum bill provisions to be unjust and unreasonable. CIG apparently assumes this reference to the minimum bill provisions meant that the ALJ only considered the minimum annual bill (Section 4) of the contract. Yet, the rest of the opinion makes clear that the ALJ considered both Sections 2 and 4 of the Service Agreement. For instance, in describing the Service Agreement the ALJ stated, "CIG's mode of billing to Natural under the F-1 and H-1 Rate Schedules is explained for the situation when the minimum bill provisions operate because Natural failed to take 90 percent of its *daily* or *annual* volumetric entitlements." *Colorado Interstate Gas Co.*, 25 F.E.R.C. ¶¶ 63,012, 65,015 (Oct. 18, 1983) (emphasis added). The ALJ clearly understood that the Service Agreement provided a single rate of compensation for failure to purchase gas on a *daily or annual* basis and that he was modifying that rate.

This conclusion is confirmed by subsequent FERC orders. In its order of June 1985, FERC surveyed the entire history of CIG's proceedings before the agency on

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[8] Since Order No. 380-C was a general order, it did not specify the precise value of the fixed cost CIG, or any other sellers, could collect for unsold gas.

the minimum purchase issue. FERC stated the ALJ found "*both* the minimum annual volume and the minimum daily take requirement in CIG's Service Agreement" to be unreasonable. *Colorado Interstate Gas Co.*, 31 F.E.R.C. ¶ 61,325 (June 19, 1985). FERC further noted that the *individualized proceedings required* CIG to modify both the minimum annual bill and the minimum daily take provisions to eliminate various costs. *Id.* The only formula for the elimination of variable costs approved in the individualized proceedings required CIG to charge F-1 fixed costs for failure to purchase either F-1 or H-1 gas. The inescapable conclusion is that FERC regarded this as the sole remedy for failure to purchase gas under either contractual provision.

Finally, FERC's amicus brief explains its current interpretation of the FERC proceedings on the minimum purchase issue. The amicus brief states:

> [T]he district court erred in holding that the Commission did not deal with the minimum purchase obligation and that therefore CIG may litigate that issue in this case . . . the Commission treated the minimum bill as the remedy for Natural's failure to live up to its minimum purchase obligation . . . therefore, the district court erred in its perception that the minimum bill and take provisions were separate and discrete matters establishing distinct remedies.

In light of the deference we owe to FERC's interpretations of its own order, *Colorado Interstate Gas*, 791 F.2d at 810; *Distrigas of Massachusetts Corp. v. Boston Gas Co.*, 693 F.2d 1113, 1119 (1st Cir.1982), and the plain meaning of the orders themselves, there is simply no room for CIG's assertion that FERC's individualized proceedings left the minimum daily take provision (Section 2) of the Service Agreement unaffected.

B. Breach of Duty of Good Faith and Fair Dealing

Natural argues the jury's verdict on bad faith breach of contract must be reversed because FERC's

modification of the rate Natural was required to pay CIG for unpurchased gas gave Natural the *unqualified* right to stop purchasing gas, provided it paid CIG the FERC established price for unpurchased gas. Natural insists that by awarding CIG damages for bad faith failure to purchase gas that were greater than FERC's established rate for failure to purchase, the district court allowed state common law to impinge upon FERC's regulatory authority. CIG asserts that Natural's bad faith alters the character of Natural's conduct so that the FERC rate for unpurchased gas does not apply. While we are unwilling to embrace Natural's claim that FERC's orders shield it from all liability for failure to purchase gas, we do agree that Natural is free from liability for failure to purchase gas based upon the implied duty of good faith and fair dealing in the Service Agreement.

The Supreme Court is wary of attempts by parties, dissatisfied with determinations of federal agencies, to neutralize the effect of those determinations through common-law actions for damages. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324, 101 S.Ct. 1124, 1133, 67 L.Ed.2d 258 (1981); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n. 6, 101 S.Ct. 2925, 2930 n. 6, 69 L.Ed.2d 856 (1981). These cases are bottomed on the principle that the Supremacy Clause requires state regulation not thwart federal policy. *Kalo Brick & Tile*, 450 U.S. at 326, 101 S.Ct. at 1134. Common-law claims that seek to litigate matters already decided by a federal agency are therefore preempted.

For instance, in *Kalo Brick & Tile*, 450 U.S. at 311, 101 S.Ct. at 1127, a shipper of goods by rail, sought to assert a state, common-law tort action for damages caused by a regulated rail carrier's decision to eliminate service on a rail line. The Supreme Court unanimously held that because the Interstate Commerce Commission had, in approving the cessation of service in administra-

tive proceedings, ruled on all the issues underlying the shippers state-court suit, the common-law action was preempted. The Court stated: "It is difficult to escape the conclusion that the instant litigation represents little more than an attempt by a disappointed shipper to gain from the Iowa courts the relief it was denied by the commission." *Id.* at 324, 101 S.Ct. at 1133.

Through its common-law claim of breach of the contractual duty of good faith and fair dealing, CIG obtained an award of damages that allowed it to collect H-1 fixed costs for unpurchased H-1 gas. FERC and this court have repeatedly denied CIG's request to modify the minimum purchase obligation of the Service Agreement to allow it to collect this rate for failure to purchase gas. *Colorado Interstate Gas*, 791 F.2d at 808-09. By allowing CIG to press this claim, the district court gave CIG a second chance to which it was not entitled.

Nevertheless, CIG argues that this case is distinguishable from *Kalo Brick & Tile*[9] and is not a collateral attack upon FERC's decision because FERC denied CIG H-1 fixed costs for unpurchased H-1 gas only if Natural decided not to purchase gas in good faith. CIG contends, once Natural decided to "shut in" CIG's gas in order to harm CIG, FERC's remedy for failure to purchase gas, a remedy which did not allow collection of H-1 fixed costs, was no longer intended by FERC to apply. Essentially, CIG is asking us to imply a good faith limitation upon the scope of FERC's remedy for failure to purchase gas.

While we find CIG's argument forceful, we cannot

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[9] The Court in *Kalo Brick & Tile* emphasized that the "commission has actually addressed the matters [the customer] wishes to raise in state court." 450 U.S. at 327, 101 S.Ct. at 1135. The Court reserved the question of whether "a state court suit is barred when the commission is empowered to rule on the underlying issues." *Id.* In this case, FERC was not explicitly confronted with the question of whether Natural's motive for not purchasing gas would be relevant to the rate CIG could collect for that gas.

ignore the Supreme Court's vigorous effort to insure agency action is not blunted by state regulation. *See, e.g., Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986) (state regulated rate for retail sale of gas did not give enough *weight* to FERC determined rate for wholesale gas sales); *Kalo Brick & Tile*, 450 U.S. at 326, 101 S.Ct. at 1134. We think that limiting the scope of the FERC developed remedy for failure to purchase gas in the manner suggested by CIG would permit circumvention of FERC authority through state contract law. In order for FERC's remedy to be effective, it must have room to breathe. As the Supreme Court has stated, "Respondents' theory of the case would give inordinate importance to the role of contracts between buyers and sellers in the federal scheme for regulating the sale of natural gas." *Arkansas Louisiana Gas*, 453 U.S. at 582, 101 S.Ct. at 2932. We think this statement applies with equal force to this case.

Further, the limited evidence we have suggests FERC intended the collection of F-1 fixed costs to be the exclusive contract remedy for failure to purchase gas. FERC's amicus brief notes the jury awarded damages for antitrust, tort, and breach of contract claims. Nevertheless, FERC *only* sought to have the damages for breach of contract reversed. FERC did not distinguish between the breach of contract damages awarded for bad faith failure to purchase gas and those awarded for failure to purchase gas under Section 2 of the Service Agreement.[10]

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[10] The district court did not ask the jury to award damages separately for breach of Section 2 of the Service Agreement and breach of the contractual obligation of good faith and fair dealing. This is troubling because we cannot determine what damages, if any, the jury intended to award for each breach.

Further, the jury incorrectly found that Natural breached its obligation to purchase gas under Section 2 of the Service Agreement. Having found that Natural deliberately breached the Service Agreement by deciding not to purchase gas, it is difficult to see

This interpretation of FERC's intent mirrors FERC's interpretation of the scope of its actions in a closely analogous context. During the gas shortage of the early 1970's, FERC permitted sellers of gas to curtail their contractually agreed upon deliveries of gas, if the curtailment was carried out in accordance with plans on file with FERC. *See, e.g., United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 421 (5th Cir.1987). Buyers who did not receive gas they contracted for sued sellers based upon breach of contract and various tort theories. *Id.*; *see also CF Industries v. Transcontinental Gas Pipe Line*, 614 F.2d 33 (4th Cir.1980). In response, sellers sought to have FERC modify their service agreements to exculpate them from liability for failure to deliver gas to buyers curtailed under curtailment plans. FERC declined to deny the purchasers all remedies for the sellers' failure to deliver gas stating:

> Claims that are essentially "*breach of contract*" in nature and arise because of curtailments initiated and conducted in accordance with effective curtailment tariffs are preempted by federal law, which nullifies them. But claims that require a finding of *negligence* to permit recovery remain unaffected.

Transcontinental Gas Pipe Line, 35 F.E.R.C. ¶¶ 61,043, 61,080 (April 7, 1986) (emphasis added).[11]

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how the jury could objectively consider the question of whether Natural acted in good faith.

Thus, even if we were to find that the bad faith claim was not preempted, we would have to order a new trial. First, the jury would have to evaluate CIG's bad faith claim in light of the fact that Natural did not breach Section 2 of the Service Agreement. Second, even if the jury still found that Natural breached its contractual obligation of good faith and fair dealing, it would have to determine the appropriate damages for this breach.

[11] Significantly, one seller challenged FERC's decision alleging that if buyers were permitted to sue based upon a seller's negligent or willful misconduct, some state courts might conclude that actions for "breach of a good faith duty" were *not* preempted. *United Gas*

We believe FERC intended to draw the same line for failure to take gas as it drew for failure to purchase. Actions based upon tort were not meant to be preempted by FERC's modification of the contract, while actions based upon breach of contract were. Any other distinction would impermissibly undermine the effectiveness of FERC orders. Thus, the jury's verdict for bad faith breach of contract must be reversed.

C. Tortious Interference with Contract

The gravamen of CIG's tortious interference with contract claim is that Natural intentionally stopped taking gas from CIG in order to force CIG to relinquish its contractual right to purchase Whitney Canyon gas from Champlin Petroleum. CIG alleged Natural was motivated by a desire to acquire the rights to purchase Whitney Canyon gas. After CIG gave up its rights to the Whitney Canyon reserves, Natural did, in fact, acquire the gas.

Natural argues that the jury's verdict, awarding damages for tortious conduct, must be reversed because CIG's claim is preempted by FERC's modification of the minimum purchase provisions. Natural also asserts that because the Service Agreement allowed it to stop purchasing gas, it may not be held liable for tortious interference based on that conduct. We disagree.

FERC's modification of the contract remedy for failure to purchase gas does not limit CIG's right to seek damages for tortious interference with contract. As noted above, in an analogous situation, FERC decided

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Pipe Line, 824 F.2d at 428. The Fifth Circuit rejected the suggestion that state courts could interpret FERC orders which allowed actions based upon negligence to permit actions for "breach of a good faith duty." Thus, at least one other court has interpreted FERC orders prohibiting suits based upon breach of contract to also forbid suits based upon breach of the contractual obligation of good faith and fair dealing.

that although it eliminated a gas seller's *contractual* liability for failure to sell gas to curtailed customers, buyers who did not receive contractually agreed upon volumes of gas could maintain suits based upon a seller's *negligent or willful misconduct. United Gas Pipe Line*, 824 F.2d at 430. By not contesting tortious interference damages, FERC apparently made the same distinction in this case. Although *Kalo Brick & Tile* requires preemption of tort actions which conflict with agency orders, 450 U.S. at 326-27, 101 S.Ct. at 1134-35, we decline to find preemption where FERC currently perceives no conflict.

More difficult to evaluate is Natural's assertion that its contractual right to choose between purchasing gas or paying CIG for gas not purchased immunized it from a tortious interference claim based upon a failure to purchase. There is some support for the proposition that conduct which is otherwise lawful ought not form the basis of a tortious interference claim simply because the alleged tort-feasor is motivated by a desire to interfere with the plaintiff's contractual relations. *See Circo v. Spanish Gardens Food Mfg. Co.*, 643 F.Supp. 51, 56 (W.D.Mo.1985); Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U.Chi.L.Rev. 61, 128 (1982). Advocates of this position are reluctant to impose limitations on conduct which is otherwise permitted in an economy based upon vigorous competition. Perlman, *supra* at 78.

While we are sympathetic to this view and recognize that the law of tortious interference is evolving, *see Restatement (Second) of Torts*, ch. 37, introductory note at 5 (1977), we believe that the better position is that taken by the Restatement and followed by many courts. This line of authority holds that motive can be a determinative factor in converting otherwise lawful behavior into "improper" conduct for which the defendant will be liable. *Restatement (Second) of Torts* § 767 com-

ment d (1977); *Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc.*, 604 P.2d 1090, 1093 (Alaska 1979); *see also* Perlman, *Interference with Contract*, 49 U.Chi.L.Rev. 61, 78 (1982). Indeed, Professor Prosser has described the contours of the tort stating that "no specific conduct is prohibited . . . and liability turns on the purpose for which the defendant acts." W. Prosser, *Law of Torts* § 129, at 979 (5th ed. 1984).

Natural's interest in being free to adjust its purchases of gas is not so strong that it cannot be limited by a requirement not to exercise its discretion for the purpose of interfering with CIG's contractual relationships. *Alyeska Pipeline*, 604 P.2d at 1093 (right to terminate contract at will did not prevent liability for tortious interference based upon termination of that contract). The tortious interference verdict will stand.[12]

III. *CIG's Antitrust Claim*

CIG claims that in addition to being a violation of the Service Agreement and a means of stealing CIG's customers, Natural's decision to stop purchasing gas was also the cornerstone of an attempt by Natural to monopolize the market for the long distance transportation of natural gas.[13] Since an attempt to monopolize typically

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[12] Natural also asserts the award of $8,000,839 in restitutionary damages was inappropriate. It argues that restitutionary damages are unavailable for tortious interference claims under Section 766A of the Restatement. While it cites one case to this effect, *Marcus, Stowell & Beye Gov't Secs., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 231-32 (5th Cir. 1986), the weight of authority holds that restitutionary damages are available for tortious interference with contract. *See Zippertubing Co. v. Teleflex, Inc.*, 757 F.2d 1401, 1411-12 (3d Cir. 1985); *Federal Sugar Ref. Co. v. United States Sugar Equalization Bd.*, 268 F. 575, 582 (D.C.N.Y. 1920); *National Merchandising Corp. v. Leyden*, 370 Mass. 425, 348 N.E.2d 771, 775-76 (1976); D. Dobbs, *Remedies* § 6, at 465 (1973).

[13] Natural also asserted an antitrust counterclaim against CIG. Natural alleged that CIG monopolized or attempted to monopolize

involves an attempt by a firm which does not possess monopolistic control over a market to become a monopolist in that market, CIG's claim is unusual because it does not allege that Natural was attempting to gain control of the transportation market for itself. Rather, CIG alleges Natural stopped purchasing gas in order to give CIG's chief competitor, the Trailblazer System [14], a monopoly in the long distance gas transportation market.

Natural asserts that a party may not be held liable for attempting to give monopoly power to another party which it does not control. This is especially true, it asserts, when the intended beneficiary of the monopolist is

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the purchase of Wyoming natural gas by intervening and threatening to intervene in FERC proceedings in which CIG's competitors proposed building new pipelines leading out of Wyoming. The district court ruled that the *Noerr-Pennington* doctrine barred evidence of CIG's activities before FERC.

The *Noerr-Pennington* doctrine requires that attempts to influence the government, including attempts to influence administrative agencies, be exempt from attack under the Sherman Act. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511-12, 92 S.Ct. 609, 612-13, 30 L.Ed.2d 642 (1972); *Bright v. Moss Ambulance Serv., Inc.*, 824 F.2d 819 (10th Cir. 1987). We agree with the district court that nothing in CIG's activities before FERC so corrupts the judicial or administrative process that those activities amount to a sham and therefore are exempt from the *Noerr-Pennington* doctrine. *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1176-77 & n. 7 (10th Cir. 1982).

[14] It is important to distinguish between NGPL-Trailblazer, one of the defendants, and the Trailblazer System. The Trailblazer System is a series of three separately owned and operated pipelines joined end-to-end which stretches from Wyoming to Nebraska. When built in 1982, the Trailblazer System greatly expanded the capacity of producers to move their gas from Wyoming to eastern markets. The westernmost segment of the Trailblazer System, Overthrust, is owned by CIG and Natural, as well as four other companies. The middle segment, WIC, is owned by CIG alone. The easternmost and longest segment of the system, Trailblazer, is owned jointly by NGPL-Trailblazer and two other companies. The Trailblazer System, the alleged beneficiary of Natural's predatory conduct, is not even a party to this case.

not a single entry but three separately operated entities owned in significant part by the alleged victim of the monopolistic scheme.

Nevertheless, Section 2 of the Sherman Act does not explicitly state that a party can only monopolize for itself. We need not decide this thorny issue because even if we assume that it is possible to create a monopoly for the benefit of a third party, CIG did not establish each of the elements of an attempted monopolization claim.[15]

CIG alleges that Natural attempted to monopolize the market by preventing CIG from offering gas transportation services to customers who might choose between CIG and the Trailblazer System. Because CIG was required to maintain capacity in its pipeline for the volume of gas Natural chose to reserve under the Service Agreement, CIG was not able to replace lost income from Natural's reduction purchases by offering "firm" [16] transportation services to new customers. In the summer of 1984, after Natural had stopped taking gas from CIG, CIG offered Natural the opportunity to reduce the capacity it

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[15] The difficulty with punishing a firm for attempting to create a monopoly for a third party which does not act as a single entity, is that the threat to competition after the monopoly is achieved is obscure. In a more typical case in which a firm is attempting, through unfair means, to gain control of a market for itself, one can be quite certain the firm will not hesitate to exercise its newly acquired monopoly power. In this case, the alleged monopolist's (Natural's) conduct says little about its *intended beneficiary's* (the Trailblazer System's) proclivity or ability to monopolize. Section 2 of the Sherman Act does not punish the mere possession of monopoly power. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62, 31 S.Ct. 502, 516, 55 L.Ed. 619 (1911).

[16] Gas can be sold on either a firm or interruptible basis. Firm sales guarantee the purchaser that he will receive the volumes of gas he reserves, while interruptible sales only guarantee deliveries if customers with higher priority do not demand the gas. Since CIG had a firm obligation to sell gas to Natural, CIG could only offer to sell interruptible service to new customers.

reserved on the CIG system. Instead of reducing its reservation, Natural chose to increase it. Thus, Natural continued to tie up CIG's capacity, while refusing to purchase gas.

Further, CIG attempted to offer interruptible service to new customers to utilize the capacity left vacant by Natural's decreased purchases. Soon after CIG began to service the new customers, Natural resumed purchases of gas, forcing CIG to interrupt its service to the new customers. Because the Trailblazer System could offer inexpensive, uninterrupted service, CIG's new customers switched to the Trailblazer System.

While Natural's alleged manipulation of its gas purchases in an effort to disrupt CIG's ability to service new customers may be reprehensible conduct, the antitrust laws cannot be invoked to punish all forms of unseemly business activity. If a party does not have monopolistic control over a market, its unfair business conduct implicates the attempt provision of the antitrust laws only if that conduct threatens to create a monopoly. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413 (7th Cir.1989); *cf. Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54, 97 S.Ct. 2549, 2559, 53 L.Ed.2d 568 (1977) ("an antitrust policy divorced from market considerations would lack any objective benchmarks"). The defendant need face the added sanction of antitrust triple damages only if the plaintiff can establish each element of an antitrust offense.

In this circuit, four elements must be proven to establish an attempt to monopolize under Section 2 of the Sherman Act: (1) relevant market (including geographic market and relevant product market) in which the alleged attempt occurred; (2) dangerous probability of success in monopolizing the relevant market; (3) specific intent to monopolize; and (4) conduct in furtherance of such an attempt. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies*, 783 F.2d 159, 161 (10th Cir.1986). In

addition, any private plaintiff seeking treble damages under Section 4 of the Clayton Act must show antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701, *cert. denied*, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977). While Natural argues that CIG has failed to establish each element of the attempted monopolization claim, CIG's failure to show a dangerous probability of successful monopolization reveals the fundamental difficulty in CIG's claim.[17]

In order to satisfy the dangerous probability of success element of an attempt claim, the plaintiff must

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[17] Several commentators have noted approvingly that the dangerous probability of success element of the attempt to monopolize offense prevents courts from expanding the Sherman Act into a broad unfair competition statute. For instance, Handler & Steuer state:

> [T]here is ample reason for excluding single-firm behavior from the serious penalties of the antitrust laws when no dangerous probability of monopolization exists. When one firm monopolizes an economically significant market or threatens such a monopoly, competition is immediately and seriously jeopardized. It was largely to combat this peril that section 2 of the Sherman Act was passed, fortified with the formidable deterrent of treble damages and criminal penalties. Short of this situation, however, single firm behavior does not present so significant a threat to competition as to warrant such harsh consequences.

Handler & Steuer, *Attempts to Monopolize and No Fault Monopolization*, 129 U.Pa.L.Rev. 125, 175 (1980) (footnote omitted); *see also* 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 833 (1978) (hereinafter Areeda & Turner); *cf.* Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich.L.Rev. 373, 454-55 (1974) (warning against expansion of the attempt provision into an unfair competition statute); *but see* Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market,"* 38 Geo.Wash.L.Rev. 215, 222 (1969); Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 Colum.L.Rev. 1451, 1459-61 (1973).

show that there was a dangerous probability the defendant would achieve monopoly status as the result of the predatory conduct alleged by the plaintiff. *Shoppin' Bag*, 783 F.2d at 162; *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 271 (7th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). The likelihood of successful monopolization is typically evaluated by examining the defendant's share of the relevant market. *Shoppin' Bag*, 783 F.2d at 161. Reformulated in terms of market share, the plaintiff must show that there was a dangerous probability that the defendant's conduct would propel it from a non-monopolistic share of the market to a share that would be large enough to constitute a monopoly for purposes of the monopolization offense.[18] The higher the firm's intial market share, the greater the likelihood that it will eventually gain monopolistic control over the market. *Id.* at 162.

CIG asserts the fact that the Trailblazer System's market share rose from 41% to 53% is sufficient evidence to support the jury's finding that there was a dangerous probability that the Trailblazer System would attain a monopoly. If this were a typical attempted monopolization case in which the defendant was attempting to acquire a monopoly for itself through the use of economic coercion, we would have little difficulty in affirming the jury's finding of dangerous probability. First, a market share at the commencement of the defendant's predatory conduct of 41% would show that the defendant would not have to acquire much additional market share in order to attain monopoly control over the market.

More importantly, however, a 41% market share typically indicates that a firm has substantial economic power

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[18] While the Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power, lower courts generally require a minimum market share of between 70% and 80%. 2 E. Kintner, *Federal Antitrust Laws* § 12.6 (1980); Areeda & Turner, ¶ 803.

in the market, and, therefore, has the tools at its disposal to elevate its market share to monopolistic levels. In other words, a high market share indicates that the defendant has the economic capacity to monopolize the market. *Id.* However, proximity to monopolistic status is not enough; the defendant must also have the ability to propel itself to monopolistic control over the market. *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir.1989) (50% market share insufficient to show dangerous probability of successful monopolization); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 827 (6th Cir.1982) ("the real test is whether [the defendant] possessed sufficient market power to achieve its aims"); *United States v. Empire Gas Corp.*, 537 F.2d 296, 305 (8th Cir.1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977) (50% market share insufficient to show dangerous probability of successful monopolization). While the *Trailblazer System's* substantial market share demonstrates its *proximity* to monopoly status, it does not indicate *Natural's capacity* to raise the Trailblazer System's market share to a monopolistic level.

CIG did not attempt to offer evidence of Natural's share of the transportation market. One might initially imagine that evidence of a firm's market share would be required in order to assess that firm's ability to obtain or confer market power, but this is not necessarily true. In this case, Natural's capacity to create a monopoly for the Trailblazer System cannot be measured by Natural's market share because Natural did not use economic coercion in its attempt to monopolize. Rather, Natural took advantage of its contractual right to stop purchasing gas from CIG to magnify the Trailblazer System's position in the market.[19] In evaluating the probability of suc-

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[19] The record does not clearly disclose how much of the Trailblazer System's market share gain reflected increased transportation volumes because CIG was unavailable as a competitor, and

cessful monopolization "we must consider the firm's capacity to commit the offense, the scope of its objective, and the character of its conduct." *Kearney & Trecker Corp. v. Giddings & Lewis, Inc.*, 452 F.2d 579, 598 (7th Cir.1971), *cert. denied*, 405 U.S. 1066, 92 S.Ct. 1500, 31 L.Ed.2d 796 (1972). In this case each of these factors is strictly determined and ultimately limited by the Service Agreement between Natural and CIG.

Natural's predatory conduct consisted of exercising its contract rights with CIG to prevent CIG from offering transportation services to long distance customers. Because Natural reserved a certain amount of space in CIG's pipeline, CIG could not offer that space to others. By continuing to reserve large amounts of gas and taking gas when CIG threatened to sell Natural's reserved capacity, Natural insured that CIG could not offer Natural's reserved capacity to the market. Yet, Natural's ability to exclude CIG was strictly limited by Natural's ability to insure its reserved capacity went empty. By exercising *all* its rights under the Service Agreement to tie up the *entire* capacity it had reserved, Natural was still only able to raise the Trailblazer System's market share to 54%.

Thus, *from the beginning*, Natural's decision to quit purchasing gas presented no danger that Natural could do anything more than shift 13% of the market to the Trailblazer System. The necessarily limited scope of Natural's objective leaves no room for speculation about the probability that the Trailblazer System would gain a monopoly. There was simply no reasonable chance, let alone a dangerous probability, that Natural, through the exercise of its contractual rights, could imbue the Trail-

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how much the market share gain simply resulted from the Trailblazer System's constant sales level in comparison with CIG's sales losses.

blazer System with sufficient market share to be a monopolist.[20]

Further, market share statistics sometimes overestimate a firm's market power. *See, e.g., Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir.1986); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 950 (1981). In this case, if we look beyond market share statistics, we are further convinced that Natural's conduct did not threaten to give the Trailblazer System the degree of market power that would constitute a monopoly for pur-

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[20] We agree with the proposition that it is no defense to an attempted monopolization charge that the defendant's attempt to monopolize proved to be unsuccessful. *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir.1984). Simply because a plan fails to succeed does not mean there was no probability that it could have succeeded. A flipped coin which lands heads still had a 50% chance of landing tails before it was flipped. The capacity of the defendant to monopolize must be evaluated at the commencement of the predatory scheme.

We also note our holding in this case does not require that in every instance where a party intends to eliminate a competitor through unfair means, the elimination of the competitor must give the predator a monopolistic market share. For instance, when a party with a substantial market share eliminates a smaller competitor through economic coercion, increased market power will give it even greater coercive power to eliminate other competitors. There is no reason to wait until the predator attacks a competitor that would put it just over the brink of monopolization before it can be stopped. *See* Note, *Attempt to Monopolize Under the Sherman Act: Defendants Market Power as a Requisite to a Prima Facie Case*, 73 Colum.L.Rev. 1451, 1462-63 (1973).

In this case, Natural sought to take advantage of a unique opportunity its contract afforded to temporarily harm a competitor of an entity in which it had an economic stake. Unlike the ordinary situation in which a firm's market share is crucial to the firm's ability to engage in predatory conduct and every predatory act makes future predation easier, Natural's ability to engage in predatory conduct would not be enhanced by conferring market share upon the Trailblazer System.

poses of the monopolization offense. One measure of the degree of market power is the persistence of a firm's ability to profitably charge monopoly prices.[21] If the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense.[22] 3 P. Areeda & D. Turner, *Anti-*

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[21] Although most courts do not explicitly discuss the persistence of a firm's ability to charge supracompetitive prices as a measure of a firm's market power, courts indirectly consider the potential longevity of supracompetitive pricing whenever they use market share to evaluate the degree of market power. Market share statistics are a useful measure of market power, in large part, because they indicate the relative durability of supracompetitive pricing capacity. The greater a firm's market share, the longer it will be able to charge monopoly prices because it will take longer for its small competitors to increase their output enough to discipline prices. *See* H. Hovencamp, *Economics and Federal Antitrust Law* § 3.1, at 58 (1985).

The durability of a firm's ability to charge supracompetitive prices also underlies another factor used to evaluate the degree of market power. Barriers to entry are often used by courts to determine whether an alleged monopolist has sufficient market power for purposes of the monopolization offense. 2 E. Kintner, *Federal Antitrust Laws* § 12.9 (1980). Barriers to entry are market characteristics which make it difficult or time-consuming for new firms to enter a market. For instance, if market entry requires the construction of large manufacturing plants, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119, 107 S.Ct. 484, 494, 93 L.Ed.2d 427 (1986), or obtaining governmental approval to enter the market, *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 628-29, 94 S.Ct. 2856, 2873-74, 41 L.Ed.2d 978 (1974), the market is said to have high barriers to entry. Often courts refuse to find a sufficient degree of market power for the monopolization offense when they determine that a market has low barriers to entry. *See, e.g., Ball Memorial Hosp.*, 784 F.2d at 1335. While a firm may have the capacity to charge supracompetitive prices in a market with low barriers to entry, that capacity is likely to be temporary.

[22] Some courts and commentators label the degree of market power necessary for the monopolization offense as "monopoly power." *See* L. Sullivan, *Antitrust* § 22, at 75 (1977) ("Monopoly power can

trust Law, at ¶ 807; *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C.Cir.1987); *Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 530 (5th Cir.1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1770 76 L.Ed.2d 344 (1983); *Metro Mobile CTS, Inc. v. Newvector Communications, Inc.*, 661 F.Supp. 1504, 1523-24 (1987); *cf. Copperweld v. Independence Tube Corp.*, 467 U.S. 752, 767-68, 104 S.Ct. 2731, 2739-40, 81 L.Ed.2d 628 (1984) (antitrust laws are only meant to condemn conduct with long-run anticompetitive effects).[23]

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be distinguished from a lesser amount of market power only in degree."); *Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 529 (5th Cir.1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1770, 76 L.Ed.2d 344 (1983). One commentator has suggested that in the future courts might more precisely define monopoly power by "focus[ing] on the *permanence* of market power, with mere market power suggesting that supranormal profits will be *quickly eroded* by new entry, and monopoly power suggesting significantly greater insulation from the *long-run* forces of entry." G. Hay, *Single Firm Conduct*, 57 Antitrust L.J. 75, 81 (1988) (emphasis added). While we do not adopt this commentator's nomenclature, we do agree with his assertion that market power must be persistent to make a firm a monopolist for purposes of the antitrust laws.

[23] A suggestion that unidentified market forces will eventually correct supracompetitive pricing will not suffice to show that market power will be temporary. Only when an alleged monopolist faces substantial competition from a *known competitor* who will enter the market in a *definite period of time*, ought courts to decline to find sufficient market power to satisfy the requirement for the monopolization offense, *Williamsburg Wax Museum*, 810 F.2d at 252 (defendant did not have monopoly in the wax figure market because a *known competitor* could, within a year, begin to deliver wax figures); *Metro Mobile CTS*, 661 F.Supp. at 1523-24 (defendant did not possess monopoly power for purposes of the monopolization or attempted monopolization offense even though it controlled 100% of the market because a known competitor had both the plans and capacity to enter the market within three years). *Cf.* Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 950, n. 28 (1981) (difficulty in identifying potential competitors forces courts to assume that a firm's ability to charge monopoly prices will be persistent).

In this case, the Trailblazer System's ability to charge supracompetitive prices could last only as long as Natural had the contractual right to tie up CIG's pipeline capacity. This right was strictly limited by the duration of the Service Agreement [24] Once Natural's control over CIG's capacity ended, the market would return to the status quo [25] since the Trailblazer System would be helpless to compete against the unused and inexpensive capacity of CIG's system.

This analysis, which requires a plaintiff to show that an attempted monopolist's conduct [26] threatened to create substantial and persistent changes in the marketplace, may allow some unfair and potentially harmful methods of competition to go unpunished by the antitrust laws. But the Supreme Court, in a now oft quoted phrase, has stated "the antitrust laws . . . were enacted for 'the pro-

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[24] The Service Agreement was to expire in 1989. Thus, the Trailblazer System would be free from competition for a longer period of time than the defendants in either *Williamsburg Wax Museum* (1 year) or *Metro Mobile CTS* (3 years). Yet, the actual number of years that the Trailblazer System would be free from competition from CIG is not the deciding factor in this case. Rather the certainty that the market will return to the status quo at a predetermined date and the fact that the Trailblazer System has no power to prevent the erosion of its market share, convince us that the market implications of Natural's conduct are not the subject of the antitrust laws.

[25] There is no suggestion in the record that Natural was in danger of driving CIG completely out of the transportation business before the expiration of the Service Agreement. Indeed, considering CIG's financial resources and record profitability during Natural's tie-up, it is unlikely that Natural could have completely excluded CIG. By attacking CIG, Natural could not alter the competitive structure of the industry which is based on a permanent superstructure. *See Cargill v. Monfort*, 479 U.S. at 119, n. 15, 107 S.Ct. at 494, n. 15.

[26] One treatise has stressed that courts ought to take a long-run view when evaluating allegedly anticompetitive conduct. In attempting to distinguish between conduct that should be addressed

tection of competition not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)), *cert. denied*, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977). The Court has long recognized that the Sherman Act "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch*, 325 U.S. 821, 826, 65 S.Ct. 1545, 1548, 89 L.Ed. 1954 (1945). We believe the triple damage sanction of the Clayton Act is too harsh a remedy for unfair methods of competition that only threaten to have a transitory impact on the marketplace. Since there was no dangerous probability that Natural would bestow upon the Trailblazer System the degree of market power either in terms of market share or persistence, necessary for the monopolization offense, the jury's antitrust verdict must be reversed.

IV. *Conclusion*

In conclusion, we hold that because FERC has already determined the appropriate contractual rate for failure to purchase gas, and Natural has paid CIG that rate, the verdicts for breach of contract and bad faith breach of contract awarding a different rate are reversed. The antitrust verdict is reversed because CIG failed to present sufficient evidence for a jury to find a dangerous probability of successful monopolization. The verdict for tortious interference with contract is affirmed.

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by the antitrust laws and conduct which should be regulated by tort law, Professors Areeda and Turner state:

> [M]ost important, is our doubt that the torts and other activities considered in this Paragraph would very often seriously impair the competitive opportunities of rivals in any significant or *permanent* way. We must beware of the inclination to condemn a monopolist on the basis of antisocial behavior that could possibly give him an improper advantage in the market. . . . The antitrust court must, therefore, insist on . . . significant and *more-than-temporary* harmful effects on *competition*.

Areeda & Turner, ¶ 737b (emphasis added).

APPENDIX B

UNITED STATES DISTRICT COURT
D. WYOMING

No. C84-139-B

COLORADO INTERSTATE GAS COMPANY,
Plaintiff,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA and NGPL-TRAILBLAZER, INC.,
Defendants.

NATURAL GAS PIPELINE COMPANY OF AMERICA, MIDCON VENTURES, INC., and NGPL-TRAILBLAZER, INC.,
Counterclaim-Plaintiffs,

v.

COLORADO INTERSTATE GAS COMPANY, WYOMING INTERSTATE COMPANY, LTD., and the COASTAL CORPORATION,
Counterclaim-Defendants.

May 29, 1987

J. Kent Rutledge, Arthur Kline Lathrop & Uchner, Cheyenne, Wyo., Gary L. Cowan, P. Michael Koenig, Michael L. Beatty, Michael L. Williams, Rebecca H. Noecker, Colorado Springs, Colo., William C. McClearn, James E. Hartley, Marilyn S. Kite, Holland & Hart, Denver, Colo., for plaintiff.

John T. Cusack, Thomas Campbell, Gordon Nash, Gardner, Carton & Douglas Chicago, Ill., Paul J. Hickey, Rooney, Bagley, Hickey, Evans & Statkus, Cheyenne, Wyo., Louis Nizer, Phillips, Nizer, Benjamin, Krim & Ballon, New York City, William Brown, Brown, Drew, Apostolos, Massey & Sullivan, Casper, Wyo., Joseph M. Wells, Neil J. Maloney, Paul E. Goldstein, Lombard, Ill., Paul Korman, Gardner, Carton and Douglas, Washington, D.C., Roy R. Robertson, Jr., Midcon Corp., Lombard, Ill., for defendants; Phillip Areeda, Langdell Hall, Cambridge, Mass., of counsel.

Thomas A. Nicholas III, Hirst & Applegate, P.C., Cheyenne, Wyo., Michael L. Betty, The Coastal Corp., Houston, Tex., for Coastal Corp.

Gerald M. Sterns, Charles Foster, Occidental Petroleum Co., Los Angeles, Cal., for Occidental.

ORDER ON POST-TRIAL MOTIONS

BRIMMER, Chief Judge.

This matter came before the Court on defendants' motion, pursuant to Fed. R. Civ. P. 50(b) and 59, for judgment notwithstanding the verdict, for new trial, or for a remittitur. The Court, having heard the arguments of counsel, having reviewed the pleading, and being fully advised in the premises, FINDS and ORDERS as follows:

Plaintiff Colorado Interstate Gas Company (CIG) and defendants, Natural Gas Pipeline Company of America and NGPL-Trailblazer, Inc. (hereinafter collectively referred to as "NGPL"), compete to transport natural gas. In July 1982, NGPL and CIG entered a contract (the Service Agreement) obligating CIG to deliver and requiring NGPL to purchase specified quantities of natural gas. The Service Agreement requires CIG to maintain sufficient gas reserves and pipeline transportation capacity to ensure delivery of NGPL's entitlements. Section 2 of the Service Agreement commits NGPL to pur-

chase a minimum daily volume of gas or to pay the fixed costs of the volumes not taken.

In 1981-1982 a new pipeline, the Trailblazer System, was constructed to transport natural gas out of the Overthrust region of Wyoming. Three pipeline segments form the Trailblazer System: the Overthrust Pipeline, the Wyoming Interstate Company or WIC Pipeline, and the Trailblazer Pipeline. NGPL-Trailblazer owns the Trailblazer Pipeline in partnership with two other companies. NGPL-Trailblazer is the operator. Trailblazer competes with CIG to transport natural gas from the Overthrust.

In July 1983, NGPL refused to accept gas from CIG. The Natural Gas Act nevertheless obligated CIG to be ready to deliver any volumes requested by NGPL. CIG could not use the pipeline capacity reserved for NGPL to ship natural gas for other customers.

CIG was consequently unable to purchase gas from its own suppliers, so it shut-in gas owned by Champlin Petroleum in the Whitney Canyon area of Wyoming. Champlin and CIG began renegotiating their contract. Champlin insisted that CIG release its rights to purchase Whitney Canyon gas. CIG acceded. The next day, NGPL bought Champlin's Whitney Canyon gas, although NGPL still refused deliveries from CIG. NGPL shipped the Whitney Canyon gas through the Trailblazer Pipeline. In addition to acquiring Champlin's Whitney Canyon reserves, NGPL purchased gas from new suppliers and increased its takes from existing gas suppliers.

CIG brought this action alleging that NGPL attempted to monopolize the market for the long-distance transportation of Wyoming natural gas, that NGPL conspired to monopolize that market, that NGPL breached the Service Agreement and its duty of good faith and fair dealing, and that NGPL tortiously interfered with CIG's business relationship with Champlin. NGPL asserted counterclaims alleging that CIG's parent, the Coastal Corpora-

tion (together with CIG and WIC), monopolized, attempted to monopolize and conspired to monopolize the purchase, transportation and sale of natural gas in the Overthrust area. NGPL also alleged that Coastal acquired and attempted to acquire competitors in violation of §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act.

At trial CIG abandoned its antitrust conspiracy claim against NGPL. The Court directed a verdict for CIG on NGPL's conspiracy counterclaim. A directed verdict was also rendered against NGPL on its claims that CIG monopolized and attempted to monopolize the sale of natural gas and that Coastal unlawfully acquired competitors. After an eight week trial, the jury retired to consider:

> 1. whether NGPL breached the Service Agreement, tortiously interfered with CIG's business or contractual relationships, and attempted to monopolize the long-distance transportation of Wyoming gas; and
>
> 2. whether Coastal, CIG and WIC monopolized and attempted to monopolize the purchase and transportation of natural gas.

The jury rejected NGPL's counterclaims and found in favor of CIG on each cause of action. CIG was awarded $159,797,156 on its breach of contract claim, $175,001,711 on its antitrust claim and $39,231,072 on its tortious interference claim. The total award reached $724,033,361 after trebling the antitrust damages. The Court, however, determined that the damages were duplicative and reduced the judgment to $549,031,650 by deleting the damage award for breach of contract. NGPL now seeks judgment notwithstanding the verdict on each of CIG's successful claims. In the alternative NGPL moves for a new trial or for a remittitur.

Substantial evidence supports the jury's verdict, and NGPL's motions for judgment notwithstanding the ver-

dict or new trial are denied. The Court concludes, however, that the jury erroneously awarded CIG $16,017,678 as damages for tortious interference with contract, and the Court will grant a remittitur in this amount. The jury also awarded CIG its future F-1 lost profits as antitrust damages. The total amount of future lost profits was $60,388,000, which was trebled to $181,164,000. The jury erred in awarding CIG its future F-1 lost profits as antitrust damages but correctly included them as damages for breach of contract. Therefore, the Court will grant a remittitur in the amount of $181,164,000 but reinstate the breach of contract damage award in the amount of $60,388,000. The total amount of the remittitur is $197,181,678.

I. JUDGMENT NOTWITHSTANDING THE VERDICT

Caution must be exercised in granting judgment notwithstanding the verdict because it deprives the prevailing party of the jury's factual determination. *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 680 (10th Cir. 1981). Granting the motion is appropriate only when the evidence points one way and no reasonable inferences support the position of the opposing party. *Equal Employment Opportunity Comm'n v. Prudential Fed. Sav. and Loan Ass'n*, 763 F.2d 1166, 1171 (10th Cir. 1985) (citing *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1974)), *cert. denied*, —— U.S. ——, 106 S.Ct. 312, 88 L.Ed.2d 289 (1985). The evidence and accompanying inferences must be viewed in a light most favorable to the prevailing party. The court may not weigh the evidence, consider the credibility of witnesses or substitute its judgment for the jury's. *Joyce v. Atlantic Richfield Co.*, 651 F.2d at 680 n. 2. The proof favoring the movant must be so overwhelming that judgment notwithstanding the verdict is the only option available to the court. *Acree v. Minolta Corp.*, 748 F.2d 1382, 1387 (10th Cir. 1984). If fair-minded people may differ as to the

conclusions or if there is substantial conflicting evidence, judgment notwithstanding the verdict must be denied. *Ryder v. City of Topeka*, 814 F.2d 1412, 1418 (10th Cir. 1987) (citing *Wylie v. Ford Motor Co.*, 502 F.2d 1292 (10th Cir. 1974)).

The jury's determination must nevertheless be supported by substantial evidence. *White v. Conoco, Inc.*, 710 F.2d 1442, 1443 (10th Cir.1983). Substantial evidence is relevant evidence found in the record as a whole which reasonable minds might accept as adequate to support the conclusion. *Allstate Ins. Co. v. Hiseley*, 465 F.2d 1243, 1247 (10th Cir.1972). The court must determine whether a rational jury could conclude that each required element of the claim was met. *Downie v. Abex Corp.*, 741 F.2d 1235, 1238 (10th Cir. 1984). The jury's findings on sharply conflicting evidence, however, are conclusively binding, for the jury is charged with the exclusive duty of assessing the credibility of witnesses and determining the weight to be given their testimony. *Ryder v. City of Topeka*, At 1420-21 (quoting *White v. Conoco, Inc.*, 710 F.2d 1442 (10th Cir.1983)).

A. Attempt to Monopolize

An attempt to monopolize requires proof of four elements: (1) a relevant market; (2) a dangerous probability of success; (3) specific intent to monopolize; and (4) conduct in furtherance of the attempt. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc.*, 783 F.2d 159, 161 (10th Cir.1986). Private plaintiffs must also show antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). NGPL urges that the evidence was insufficient to permit a reasonable jury to conclude that CIG established the essential elements of an attempt to monopolize. BRIEF OF NATURAL GAS PIPELINE COMPANY OF AMERICA IN SUPPORT OF MOTIONS FOR JUDGMENT NOTWITHSTANDING THE

VERDICT, NEW TRIAL AND/OR REMITTITUR at 9 (hereinafter cited as "NGPL Brief").

1. Antitrust Injury

Private plaintiffs must prove antitrust injury to recover treble damages. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. CIG failed to prove antitrust injury, NGPL contends, because CIG's injury does not flow from diminished competition in the market for the transportation of natural gas and because the damages awarded by the jury do not reflect any anticompetitive effect of the violation. NGPL characterizes CIG's claim of antitrust injury as one for lost profits under the Service Agreement, a loss for which the antitrust laws do not afford relief. Even if such losses were cognizable, NGPL argues, CIG failed to connect its lost profits to its antitrust claim.

CIG claims that NGPL's conduct injured competition. The shut-in, tie-up and manipulation of takes was designed to establish control of the market and to achieve monopoly. Competition was injured, CIG argues, because the marketplace was deprived of a low-cost transportation alternative. The shut-in precluded CIG from competing with the Trailblazer System to transport NGPL's gas and prevented CIG from providing noninterruptible transportation services to other pipelines. Consumers and producers, CIG concludes, thus had to pay higher prices to transport Wyoming gas.

The United States Supreme Court defines antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation. *Id.* It should be the type of loss that the claimed violation would be likely to cause. *Id.* (quoting *Zenith Radio*

Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 89 S.Ct. 1562, 1577, 23 L.Ed.2d 129 (1969)).

The antitrust injury test is ambiguous. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U.Chi.L.Rev. 467 (1980). Two recent United States Supreme Court cases help to clarify the concept of antitrust injury.

Plaintiff in *Blue Shield of Virginia v. McReady*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), was a health insurance subscriber whose benefits included reimbursement for psychiatrists' fees but not psychologists' fees. Plaintiff alleged that Blue Shield conspired with psychiatrists to drive psychologists from the health care market. The district court dismissed the case, holding that plaintiff lacked standing because she was not a competitor in the health care market. The court of appeals reversed. It held that treble damages are available to any person whose injury is directly or proximately caused by a violation of the antitrust laws. *Id.* at 468-72, 102 S.Ct. at 2542-44.

On appeal the Supreme Court addressed the doctrines of standing and antitrust injury. With regard to the latter, the Court embraced the view that recovery of treble damages should be linked to the procompetitive policy of the antitrust laws. *Id.* at 482, 102 S.Ct. at 2550. At the same time, it rejected the claim that *Brunswick* limits recovery to those plaintiffs who show that their injuries reflect the anticompetitive effect of the violation. *Id.* The Court held that plaintiffs demonstrate antitrust injury where their injuries are "inextricably intertwined with the injury the conspirators sought to inflict on . . . the market." *Id.* at 483-84, 102 S.Ct. at 2550-51. The Court also said that a plaintiff need not prove an actual lessening of competition or that it was driven from the market. *Id.* at 482, 102 S.Ct. at 2550 (quoting *Brunswick*, 429 U.S. at 490 n. 14, 97 S.Ct. at 698). Two facts distinguished *McCready* from

Brunswick. First, plaintiff alleged a purposefully anti-competitive scheme. Second, plaintiff did not label increased competition as a harm to her. *Blue Shield of Virginia v. McCready*, 457 U.S. at 483 & n. 19, 102 S.Ct. at 2550 and n. 19. The Court finally noted that "the relationship between the claimed injury and that which is unlawful in the defendant's conduct, as analyzed in *Brunswick*, is *one factor* to be considered in determining the redressability of a particular form of injury under § 4." *Id.* at 483 n. 19, 102 S.Ct. at 2550 n. 19 (emphasis added).

The additional factors to be considered became clear in *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). In that case, a carpenters' union sued an association of general contractors, alleging that the association influenced its members and third parties to withhold their business from unionized firms in order to restrain the union's business activities. *Id.* at 521-23, 103 S.Ct. at 899-900. The question presented was whether the union could recover for injuries resulting from the association's coercion of third parties. *Id. at* 535, 103 S.Ct. at 907. The Court held that the union lacked standing to seek treble damage. *Id.* at 545-46, 103 S.Ct. at 912.

The Court evaluated plaintiff's harm, the alleged wrongdoing and the relationship between them. *Id.* at 535, 103 S.Ct. at 907. Several factors were examined: the causal connection between the violation and the injury, defendant's intent to cause the harm, whether Congress intended to redress the injury, the existence of a class of persons more directly injured by the violation, the directness of the causation between the violation and the injury, the degree to which the claim was speculative, the availability of other more appropriate remedies, and the judicial interest in managing complex

litigation and avoiding double recovery. *Id.* at 537-44, 103 S.Ct. at 908-11.[1]

McCready and *Associated General Contractors* thus suggest that many factors must be considered in a proper analysis of antitrust injury. In this case, CIG alleged that NGPL attempted to monopolize the long-distance transportation of natural gas by excluding CIG from the market. Three issues are raised: whether a reasonable jury could conclude that CIG was excluded from the market, whether the alleged injury is redressable under the antitrust laws, and whether a reasonable jury could conclude that the violation and the injury were connected.

The Court must view the evidence as a whole and follow the admonition that an antitrust plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n. 18 (10th Cir.1984) (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985).

Viewed as a whole and in a light most favorable to CIG, ample evidence supports the jury's determination that CIG was excluded from the market. CIG's theory of attempted monopolization is built on several related acts. The first step was the shut-in of CIG gas at the H-1 delivery point. This closed off the southern outlet for Wyoming gas. CIG, to cut back its own supplies,

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[1] While *Associated General Contractors* is a standing case, it aids in analyzing CIG's claims. The concepts of standing and antitrust injury are similar, and many courts have incorporated *Brunswick* into their standing tests. *See, e.g., John Lenore & Co. v. Olympic Brewing Co.*, 550 F.2d 495 (9th Cir.1977). Justice Marshall, the author of *Brunswick*, described that opinion as one denying standing. *Associated General Contractors*, 459 U.S. at 549 (Marshall, J., dissenting).

reduced takes from Northwest Pipeline, which was buying substantial amounts of natural gas in Wyoming and transporting it to the south and east through CIG's system. Northwest Pipeline sent the gas to the Seattle market to avoid transporting it through the Trailblazer System at a higher cost or breaching its contracts with its own suppliers. This in turn saturated the Seattle market, where Canadian natural gas was plentiful. The shut-in thus closed off the outlet for Wyoming gas in the Northwest. Because the Northwest Central and Kansas-Nebraska pipelines stop short of the Overthrust, closing the northwest and southeast outlets left one transportation alternative for Wyoming natural gas: the Trailblazer System. Tr. at 1550-55; 1693-94. CIG had difficulty obtaining new business, because the Service Agreement compelled CIG to stand ready to deliver if NGPL resumed takes. When CIG found new customers, the ANR and Tennessee pipeline companies, NGPL resumed takes, forcing CIG to interrupt its service and to lose its new customers. Then NGPL again suspended its takes. Tr. at 1511-20. Although NGPL vigorously disputed this theory at trial, the jury could have concluded that CIG was excluded from the market for the long-distance transportation of Wyoming natural gas.

An attempted monopolization need not cause actual market damage, but must simply threaten to produce the type of market damage contemplated by the antitrust laws. *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 994 (5th Cir.1983), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 270 (7th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). The jury could have concluded that competition actually diminished. Evidence was presented showing that, following the shut-in, NGPL's market share for the long-distance transportation of Wyoming natural gas rose from approximately forty-two percent to fifty-five percent, while CIG's share dropped from twenty-three

percent to thirteen percent. Tr. at 1505-09; Plaintiff's Exhibit 1758.

The next question is whether lost profits caused by exclusion from the market is an injury which the antitrust laws are intended to prevent. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. Congress intended to preserve competition by enacting the antitrust laws. *Id.* at 488, 97 S.Ct. at 697. Preserving competition in turn promotes maximum consumer economic welfare through efficient use and allocation of scarce resources. I P. Areeda & D. Turner, *Antitrust Law* ¶ 103, at 7 (1978). Antitrust injury narrows the standard for recoverable damages to those actually flowing from antitrust violations that cause market inefficiency. Page, *supra*, 47 U.Chi.L.Rev. at 471. Firms may exclude competitors and yet increase efficiency. The mere fact that a firm has been foreclosed from selling does not, in an economic sense, necessarily mean that it suffered antitrust injury. *Id.* at 484, 97 S.Ct. at 695. One principle *Brunswick* may support is that reductions in profit attributable to conduct preserving allocative efficiency or increasing productive efficiency cannot be recovered as damages. *Id.* at 485, 97 S.Ct. at 695.

Evidence was presented in this case that the Trailblazer System's transportation costs substantially exceeded those of the CIG system. Tr. at 1569-78. The evidence thus supports an inference that a lower-priced competitor was excluded in favor of a higher-priced competitor without a corresponding increase in allocative or productive efficiency. The jury could thus conclude that NGPL's conduct was anti-competitive and redressable under the antitrust laws.

CIG's injury flows from that which makes the defendant's acts unlawful and reflects the anticompetitive effects of the violation. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. Competition was injured by the exclusion of a low-cost competitor from the market. CIG's ex-

clusion resulted in higher prices to producers, shippers, and consumers of natural gas. An increase in price resulting from dampened competitive market forces is redressable under § 4. *Blue Shield of Virginia v. McCready*, 457 U.S. at 482-83, 102 S.Ct. at 2550. CIG also experienced lost profits. Increased prices and lost profits are likely to be caused by the exclusion of a lower-priced competitor. CIG thus proved the type of loss that the claimed violation would be likely to produce. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697.

The third issue is whether the jury reasonably could have concluded that CIG's injury flowed from NGPL's violation. NGPL argues that CIG failed to connect its lost profits to its antitrust claim. NGPL purchased natural gas from CIG, not transportation services. It thus argues that CIG's lost profits resulted from lost sales to NGPL (as opposed to lost opportunities to transport Wyoming natural gas) and that CIG failed to prove that it lost profits on the transportation of Wyoming natural gas. NGPL therefore reasons that CIG failed to prove that it lost profits in the market for the long-distance transportation of Wyoming natural gas.

The testimony of CIG's damage expert, Dr. Rhodes, belies NGPL's assertion that CIG's lost profits are unconnected to the long-distance transportation of natural gas. Dr. Rhodes testified that he examined CIG's variable costs, fixed costs and return on investment. Variable costs are the costs of acquiring and selling gas to other companies. Fixed costs are the costs of building and maintaining a pipeline. Return on investment is the owner's return of equity. Dr. Rhodes excluded variable costs from the calculation of lost profits. Tr. at 2556-58. Excluding variable costs eliminated lost sales of natural gas from the damage calculation. Dr. Rhodes calculated past lost profits by subtracting F-1 fixed costs from H-1 fixed costs and multiplying the difference by the volumes not taken. Tr. at 2561. Subtracting F-1

from H-1 excludes field natural gas from the damage calculation and thus only measures CIG's transportation costs. CIG's past lost profits measure the profits its assets would have generated but for the antitrust violation. They are therefore related to the expected gain resulting from the attempt to monopolize. Because they represent the potential return on output of a competitor excluded from the market, lost profits are an appropriate measure of antitrust injury. Page, *supra*, 47 U.Chi.L.Rev. at 486-87. The jury therefore could reasonably conclude that CIG's past lost profits were connected to the long-distance transportation market. *But see infra* text at 1479-80 for a discussion of future lost profits.

Turning to the contention that CIG failed to show that it suffered lost profits from the transportation of Wyoming natural gas, evidence was presented that the movement of Wyoming gas through the CIG system to the H-1 delivery point depended on NGPL accepting delivery of that gas. All movement of Wyoming gas stopped when NGPL refused to take natural gas at the H-1 delivery point. The transportation of Wyoming natural gas is thus inextricably tied to the injury NGPL sought to inflict on CIG and the market. The jury could have concluded that CIG established that it lost profits on the sale of Wyoming natural gas and that CIG's injury flowed from the defendant's unlawful act. *Blue Shield of Virginia v. McCready*, 457 U.S. at 484, 102 S.Ct. at 484, 102 S.Ct. at 2551.

NGPL argues that the shut-in and tie-up of CIG's pipeline capacity did not injure competition because CIG was not driven out of business. As the Court in *Brunswick* noted, however, plaintiffs seeking treble damages need not "prove an actual lessening of competition in order to recover. . . . [C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." *Id.* at 489 n. 14, 97 S.Ct. at 698 n. 14.

Associated General Contractors further bolsters the jury's verdict. Substantial evidence supports the jury's conclusion that the antitrust violation and CIG's injury were causally related and that Congress intended to remedy the type of injury CIG suffered. CIG alleged, and the jury found, that NGPL specifically intended to harm CIG. No other class of persons was more directly injured and thus in a better position to enforce the antitrust laws. The claim is not speculative as that term was used in *Associated General Contractors*.[2] CIG presented evidence that its share of the market declined because of the shut-in, resulting in lost profits. Unlike *Associated General Contractors*, where the union could resort to the labor laws for redress, CIG lacked an alternative remedy. The jury's verdict is thus consistent with *Associated General Contractors*.

The verdict is also consistent with *Brunswick*. At issue in *Brunswick* was whether damages are recoverable for lost profits incurred when a competitor remains in business. *Id.* at 484, 97 S.Ct. at 695. The Court observed that the injury claimed was inimical to the purpose of the antitrust laws. *Id.* at 488, 97 S.Ct. at 697. Central to this conclusion was that plaintiff sought damages for increased competition. *Id.* In contrast, CIG claimed that its lost profits flowed from a purposeful scheme to diminish competition. Further, CIG established actual injury in fact, whereas the plaintiff in *Brunswick* merely showed the loss of an expected windfall. *Id.* Finally, unlike the situation in *Brunswick*, damages are not an anticompetitive remedy. The jury's award of damages warns firms against excluding lower-priced competitors from the market by predatory conduct and thereby en-

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[2] In *Associated General Contractors*, the union failed to allege that any bargaining agreement was broken as a result of the violation, that the share of the market controlled by unionized firms had diminished, that union membership declined, or that its revenues decreased. *Associated General Contractors*, 459 U.S. at 542.

courages stronger competition. *See* II P. Areeda & D. Turner, *Antitrust Law* ¶ 346, at 246-47 (1978).

The jury was instructed that CIG was required to prove a causal connection between the antitrust violation and injury to its business. Jury Instruction No. 42. The instruction also required the jury to find that the type of injury was one which the antitrust laws were intended to prevent and that the injury was attributable to some harm to competition. *Id.* The jury is presumed to follow the instructions given by the trial court. *United States v. Hall*, 805 F.2d 1410, 1417 (10th Cir. 1986). Substantial evidence supports the jury's finding that CIG proved antitrust injury, and judgment notwithstanding the verdict cannot be granted on this ground.

2. Relevant Market

NGPL contends that CIG incorrectly defined the relevant market. The relevant market consists of the relevant product market and the relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1528 (10th Cir. 1984), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). NGPL apparently concedes that Wyoming natural gas is the relevant product but disputes CIG's definition of the relevant market as the long-distance market for the transportation of that gas. NGPL also argues that the Court erred by instructing the jury on CIG's theory of the relevant market.

The relevant geographic market is the geographic area in which sellers and buyers of products or services do business. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580 (1961); *United States v. Grinnell Corp.*, 384 U.S. 563, 588-89, 86 S.Ct. 1698, 1712-13, 16 L.Ed.2d 778 (1966) (Fortas, J., dissenting). The boundaries of the relevant market must correspond to the commercial realities of the indus-

try and be economically significant. *Brown Shoe Co. v. United States*, 370 U.S. at 336-37, 82 S.Ct. at 1529-30.

CIG claimed that the relevant market was the long-distance market for transportation of Wyoming gas from producing areas within Wyoming and the Overthrust to points of interconnection with major interstate trunk-lines. NGPL contends that the relevant market must include local transportation to cities such as Denver and Salt Lake City. NGPL submitted data showing that substantial volumes of gas produced in the Overthrust were consumed in Wyoming, Colorado and Utah. Tr. at 7453; Defendants' Ex. 2060. CIG offered evidence that, by the early 1980s, production of natural gas in the Overthrust outstripped local consumption. Tr. at 1453-67; Plainitff's Ex. 1754, 1755, 1756. Although NGPL's expert, Dr. George R. Hall, challenged CIG's definition of the relevant market, he testified that by 1983 production exceeded local consumption by 266 billion cubic feet. Tr. at 7454. CIG thus argued that transporation to local markets did not afford a real choice to producers and shippers of Wyoming gas, because demand was greater in midwestern and eastern markets.

In *Urited States v. Grinnell Corp.*, 384 U.S. 563, 575, 86 S.Ct. 1698, 1706, 16 L.Ed.2d 778 (1966), the Supreme Court determined that the relevant geographic market for fire and burglary protection services provided by defendants' central stations was a national market, although the individual stations only served areas within a twenty-five mile radius. The Court reasoned that "the business of providing such services is operated on a national level" and that the "national market . . . reflects the reality of the way . . . [defendants] built and conduct their services." *Id.* at 575, 576, 86 S.Ct. at 1706. In reaching this conclusion, the Court looked to the existence of national planning, agreements covering activities in many States, the multistate nature of the business,

and the existence of nationwide inspection, certification and rate-making. *Id.* at 575, 86 S.Ct. at 1706.

In this case, the jury heard evidence that natural gas pipeline companies conduct interstate business subject to national setting of prices, rates and terms by the Federal Energy Regulatory Commission (FERC). The Service Agreement covered activities in many States. NGPL's stated objective for the Trailblazer System was to "move natural gas from the Overthrust Area of Wyoming to interconnections with existing major interstate pipeline systems for delivery of substantial quantities of Rocky Mountain gas to eastern and mid-western markets." As in *Grinnell*, the jury could reasonably conclude that CIG's definition of the relevant market corresponded to the commercial realities of the industry and was economically significant.

The determination of the relevant market is normally a question of fact. *Telex Corp. v. International Business Mach. Corp.* 510 F.2d 894, 915 (10th Cir.) (per curiam), *cert. dismissed*, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1975). Where each party presents substantial evidence concerning the appropriate relevant market, the issue becomes a jury question. *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 246 (10th Cir.1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977). NGPL contends, however, that the relevant market instruction tainted the jury's finding. NGPL Brief at 20-21.

This argument is without merit. Counsel failed to apprise the Court of its objection before the jury retired. Further, NGPL's proposed instruction on the relevant market included language almost identical to that which it now describes as erroneous.

Error may not be assigned to the giving of an instruction unless, before the jury retires, the objecting party raises an objection and distinctly states "the matter to

which he objects and the grounds of his objection." Fed. R.Civ.P. 51. The objection must be sufficiently specific to bring into focus the precise nature of the alleged error. *Rogers v. Northern Rio Arriba Elec. Coop., Inc.*, 580 F.2d 1039, 1042 (10th Cir.1978). At the instruction conference, NGPL objected to the organization of the relevant market instruction and recommended moving one of the paragraphs in the instruction. The Court accepted this suggestion, and counsel indicated that the instruction was acceptable. Tr. at 8468-70. NGPL now asserts that the instruction invited the jury to define the relevant market as the long-distance transportation of natural gas. NGPL Brief at 20. Under these circumstances, the Court was not apprised of NGPL's present position before instructing the jury.

NGPL's present objections also overlooks it earlier representations to the Court. The instruction given to the jury said that "Colorado Interstate claims that the relevant service market is the transportation of natural gas from producing areas to interconnections with major interstate trunklines." Jury Instruction No. 30. NGPL's proposed instruction stated that "Colorado Interstate claims that the relevant market is the long-distance transportation of natural gas from producing areas within the state of Wyoming and the Overthrust region." DEFENDANTS' AND COUNTER-CLAIM PLAINTIFFS' THIRD SET OF REVISED AND SUPPLEMENTAL JURY INSTRUCTIONS, NATURAL'S FIRST PROPOSED INSTRUCTION NO. 25 [Relevant Market]. NGPL's proposed instruction is virtually identical to the charge to the jury.

Finally, the instruction is not patently erroneous or prejudicial. *See Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 925 (10th Cir.), *cert. denied*, 469 U.S. 853, 105 S.Ct. 176, 83 L.Ed.2d 110 (1984) (jury instruction reviewed under a plainly erroneous standard where objection not tendered before jury retires). The

instruction incorporates the applicable legal standards. Substantial evidence supports the jury's conclusion that CIG proved the existence of a relevant market. Judgment notwithstanding the verdict is inappropriate in these circumstances.

3. Dangerous Probability of Success

A dangerous probability of success is the probability of attaining the power to control prices and exclude competition in the relevant market. *Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc.*, 783 F.2d 159, 162 (10th Cir.1986). NGPL contends that FERC's regulation of natural gas pipelines precludes a dangerous probability of success as a matter of law. It also claims that the jury's finding of a dangerous probability of success is against the weight of the evidence.

FERC's control of prices and market entry, NGPL argues, prevents any pipeline from controlling prices and excluding competition. The Natural Gas Act, however, does not insulate companies within its purview from the antitrust laws. *California v. Federal Power Comm'n*, 369 U.S. 482, 485-86, 82 S.Ct. 901, 903-04, 8 L.Ed.2d 54 (1962). Antitrust liability may arise despite the existence of pervasive regulatory control. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973).

Two cases suggest that agency regulations may foreclose a probability of successful monopolization. In *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 354 (5th Cir.), *cert. denied*, 449 U.S. 870, 101 S.Ct. 208, 66 L.Ed.2d 90 (1980), the court determined that a municipal power company lacked the power to control prices and exclude competition. The defendant power company was the only franchised electric utility in the Houston area and constituted a "natural monopoly for the distribution of electric power." *Id.* at 345. In con-

trast, CIG and NGPL compete within the same market. As the court noted, violations of the antitrust laws can occur when regulated industries actually compete and anticompetitive activity surfaces. *Id.* at 354-55. Because neither CIG nor NGPL holds the sole franchise for transportation of natural gas from the Overthrust, the jury's finding of dangerous probability of success is consistent with *Almeda Mall.*

Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co., 615 F.2d 1372, 1375-76 (5th Cir.), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980), arose from the defendant's refusal to provide interconnections to a smaller local competitor. The court said that the existence of regulatory control is relevant to the existence of monopoly power and "may even prohibit a finding of such power as a matter of law." *Id.* at 1386-87. The court held, however, that the regulatory scheme is relevant evidence of monopoly power. *Id.* at 1386. Whether the defendant possessed such power is a jury question. *Id.* The mere fact of extensive federal regulation thus does not immunize NGPL from antitrust liability.

Regulation of the industry is nevertheless relevant evidence of the power to control prices and exclude competition. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1105-06 (7th Cir.), *cert. denied*, 464 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983). FERC's role in this case surfaced early in the trial. The first witness, Mr. O'Connell, indicated that FERC regulates the industry. Tr. at 211-12. He was extensively cross-examined on the course and outcome of FERC proceedings. Tr. at 578-97. The record is replete with testimony concerning FERC orders. Witnesses were permitted to explain their understanding of FERC orders to the extent they relied on those orders in taking action or forming opinions. *See, e.g.*, testimony of Dr. Leitzinger, Mr. Morgan, Dr. Rhodes, Mr. Grubb, Mr. Kitchens, Mr.

McElligott, Mr. Morrow, Mr. Oxford, Mr. Lawrence, Dr. Hall. NGPL thoroughly explored FERC Regulations and FERC Order 380 during its cross-examination of Mr. Morgan. Tr. 2328-34, 2391-94. Testimony about FERC was excluded only when unduly prejudicial or barred by Fed.R.Evid. 201. The existence of the regulatory scheme was thus presented to the jury.

NGPL did not request, or object to the absence of, jury instructions stating that FERC's regulatory authority should be considered in determining the existence of a dangerous probability of success. *See Castleberry v. NRM Corp.*, 470 F.2d 1113, 1120 (10th Cir.1972) (plaintiff's failure to request jury instruction on one theory of liability, coupled with the statement that counsel did not object to defendant's instructions, precluded appeal of court's failure to instruct jury on omitted theory of liability). NGPL objected to the instruction given on the ground that NGPL's market share was insufficient to permit a finding of dangerous probability of success. Tr. at 8476-81. NGPL sought a directed verdict on the ground that CIG failed to prove a dangerous probability of success. The reasoning was that NGPL possessed an insufficient market share. Regulatory control by FERC was not mentioned. Tr. 8381-84. NGPL did not assert its present position at trial.

FERC's authority over CIG and NGPL does not, as a matter of law, preclude a finding that NGPL possessed the power to control prices and exclude competition. Even if it did, NGPL failed to raise the issue during trial. *See Glasscock v. Wilson Constructors, Inc.*, 627 F.2d 1065, 1068 (10th Cir.1980) (a party may not complain of error which it induced or invited); *Rogers v. Northern Rio Arriba Elec. Coop., Inc.*, 580 F.2d 1039, 1042 (10th Cir.1978) (the purpose of Fed.R.Civ.P. 51 is to clarify the objecting party's position and give the trial court an opportunity to make changes). The remaining

issue is whether the jury's finding of a dangerous probability of success is against the weight of the evidence.

A dangerous probability of success may be shown by market power which in turn may be demonstrated through market share, expressed as a percent of the relevant market. *Shoppin' Bag*, 783 F.2d at 161. Determining market power also requires an examination of the defendant's market strength as measured by the number and strength of its competitors, ease of market entry, consumer sensitivity to changes in price, innovations in the market and whether the defendant is a multimarket firm. *Id.* at 162. Some proof of overt predatory conduct is also required. *Id.* at 163.

CIG calculated market shares based on capacity control of the Trailblazer System (but excluded the WIC pipeline). The owners of the three pipeline segments contributed to the project's construction. In return each received ownership shares. They also received a share of the Trailblazer System's total pipeline capacity in proportion to the amount of debt assumed. Capacity control, factored for the system's different pipeline sizes, constituted each party's market share. Using this method, NGPL's market share was over 50 percent. Tr. at 1479-95. NGPL argued that CIG's methodology skews the parties' positions in the market. It calculated market share based on each partner's ownership of the Trailblazer System. By this method, NGPL's market share is only 33 percent.

The central issue is the defendant's economic power in the relevant market. *E.J. Delaney Corp. v. Boone Bell, Inc.*, 525 F.2d 296, 306 (10th Cir.1975), *cert. denied*, 425 U.S. 907, 96 S.Ct. 1501, 47 L.Ed.2d 758 (1976). Actual ownership of the Trailblazer System is one measure of economic power in the market for the long-distance transportation of Wyoming natural gas. Control of the system's overall transportation capacity is an equally valid indicator, especially when coupled with evidence

showing that volumes passing through the Trailblazer System increased substantially following the shut-in. Tr. at 1585-87; Plaintiff's Ex. 1763. Sufficient evidence was thus presented from which the jury could conclude that NGPL possessed more than a 50 percent share of the relevant market.

Factors besides market share must be considered. *Shoppin' Bag*, 783 F.2d at 162. CIG's evidence of the parties' strength showed that, prior to the shut-in, NGPL controlled 41 percent of the market compared with CIG's 23 percent share. After the shut-in, CIG controlled 13 percent while NGPL's share rose to 54 percent. Plaintiff's Ex. 1758. NGPL's studies showed that CIG controlled nearly 81 percent of the pipeline capacity coming out of Wyoming. Tr. at 6468-69; Defendants' Ex. 3094. The evidence also showed that FERC regulations made market entry difficult. Finally, at the time of the shut-in, demand for natural gas was declining. One of Champlin Petroleum's gas contract managers, Mr. Gordon Daty, testified that NGPL was the only firm interested in Champlin's Whitney Canyon reserves following CIG's release. As a consequence, Champlin received a lower price for Whitney Canyon gas. NGPL then increased its transportation charges for that gas. Tr. at 4328-35. The jury thus could have concluded that the relevant market was vulnerable to control of prices. Evidence was also presented that CIG was excluded from the market by NGPL's aggressive conduct. *See supra* text at 1460-61.

The existence of a dangerous probability of success is a jury question. *Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d at 1387. The jury apparently rejected NGPL's market share data and accepted CIG's. The weight of the evidence supports the jury's finding that NGPL possessed the power to control prices and exclude competition. That evidence showed NGPL's aggressive conduct, CIG's exclusion from the market, the market's vulnerability to increases in trans-

portation prices and that prices actually increased. This constitutes sufficient evidence from which the jury could conclude that CIG proved a dangerous probability of success by a preponderance of the evidence.

4. Specific Intent to Monopolize and Anticompetitive Conduct

A violation of § 2 of the Sherman Act requires a specific intent to monopolize. *United States Steel Corp. v. Fortner Enter. Inc.*, 429 U.S. 610, 612 n. 1, 97 S.Ct. 861, 863 n. 1, 51 L.Ed.2d 80 (1977); *Shoppin' Bag*, 783 F.2d at 161. A desire to increase market share is insufficient. *United States Steel Corp. v. Fortner Enter. Inc.*, 429 U.S. at 612 n. 1, 97 S.Ct. 863 n. 1. A defendant must act with specific intent to destroy competition or build a monopoly. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626, 73 S.Ct. 872, 890, 97 L.Ed. 1277 (1953). Specific intent to monopolize is defined as an intent to acquire market power and exclude others from competition. *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d at 306 (quoting *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 586 (10th Cir. 1961)).

Proof of exclusionary intent requires evidence that a business intends to use or does use unfair weapons. *Pacific Eng'g & Prod. Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir. 1977). Specific intent may be proved by direct evidence or inferred from a firm's anticompetitive conduct. *Aspen Skiing Co. v. Aspen Highlands Skiing*, 472 U.S. 585, 608 n. 39, 105 S.Ct. 2847, 2860 n. 39, 86 L.Ed.2d 467, 484 n. 39 (1985) (quoting R. Bork, *The Antitrust Paradox* 157 (1978)). Absent direct evidence of specific intent to monopolize, defendant's conduct must substantially restrain trade, clearly threaten competition or be clearly exclusionary. *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1374 (9th Cir. 1983) (quoting *William*

Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1028 (9th Cir. 1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982)). Specific intent may not be inferred from activities motivated solely by legitimate business considerations. 16B *Business Organizations*, J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 9.02[5] (1986).

The issues are whether a jury could reasonably find that NGPL specifically intended to monopolize the relevant market and, if so, whether NGPL's activities were motivated solely by legitimate business considerations. The relevant factors in examining these questions are whether the acts are ordinary business practices typical of those used in a competitive market and whether the acts constitute an attempt to acquire monopoly power. *Telex Corp. v. International Business Mach. Corp.*, 510 F.2d 894, 925-26 (10th Cir.) (per curiam), *cert. dismissed*, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1975).

CIG's evidence of specific intent to monopolize came partly from internal NGPL memoranda. In June 1983, CIG proposed to change the H-1 delivery point from Texas to the entry point of the Trailblazer Pipeline. The change would have freed the southern part of CIG's system from the effects of the shut-in. Tr. at 1540-41. Mr. Hannig, a project analyst for NGPL, observed that "[t]here are many implications involved in making this switch," including whether "this [would] free-up capacity on CIG's system so they could transport for others." Plaintiff's Ex. 1325. In August 1984, CIG invited NGPL to change or "renominate" the volumes of natural gas NGPL was entitled to receive under the Service Agreement. A smaller nomination by NGPL would have reduced CIG's obligation to deliver natural gas to NGPL and thus increased CIG's capacity to serve other customers. Tr. at 1544. In a memorandum to Mr. Eberst, NGPL's Vice-President for Marketing and Rates, Mr. Wozbut, NGPL's Rate Coordinator, recognized that "nom-

inations of entitlements determine whether CIG's system can satisfy customer requirements on a supply and capacity basis." Plaintiff's Ex. 763. The renomination proposal forced NGPL to "determine the status of CIG as a continuing supply source and possibly as a major competitor for Rocky Mountain gas. Management must determine whether . . . freeing up CIG capacity may hinder Natural in any of its endeavors." *Id.* NGPL nominated its full capacity under the Service Agreement yet refused to accept delivery of natural gas when the nomination became effective. Tr. at 8260; Plaintiff's Ex. 1769.

The evidence also showed that NGPL singled out CIG from other NGPL suppliers and ignored its own gas scheduling policies. NGPL scheduled its natural gas requirements by using a priority list of suppliers. Beginning with the last source on the priority list, NGPL would turn each supplier up to its daily contract quantity or DCQ, progressing up the list to each successive source. CIG, however, was not assigned a DCQ level on the priority list. Each time NGPL went through its priority list, CIG was skipped until all other sources had been turned up to their maximum levels. Tr. at 2202-37.

CIG argued that NGPL's motive for the shut-in was to eliminate lower-priced competition from CIG. The Trailblazer System was operating at only 60 percent of planned levels and at approximately 50 percent of capacity. Tr. at 1569, 1571-78; Plaintiff's Ex. 1333, 483, 399, 500. The evidence shows that NGPL viewed CIG as a major competitor and intended to hinder CIG's ability to compete by controlling its pipeline capacity. The jury could have concluded that NGPL's conduct threatened competition by excluding CIG as a competitor and thus inferred that NGPL specifically intended to monopolize the relevant market. The question is whether the jury could properly make that inference or whether NGPL's conduct was motivated solely by legitimate business concerns.

NGPL defended the shut-in by claiming that CIG's prices were too high, that it needed to reduce its own rates and its take or pay liabilities to protect itself from potential liability under the *United Gas Pipeline* case, and that it simply had an oversupply of natural gas. The evidence contradicts the first assertion. After the shut-in, NGPL repeatedly purchased gas from other suppliers that was more expensive than CIG's F-1 or H-1 gas. Tr. at 1649-51, 2436-39; Plaintiff's Ex. 1433, 1590. Further, a memorandum from Mr. Pasteris to Mr. Grubb written in August 1984 noted that "CIG's sales to Natural are currently priced at $3.18/Mcf for F-1 and $3.63/Mcf for H-1 gas. Given that this is the price delivered to Natural's mainline the costs are not unreasonable." Plaintiff's Ex. 765. NGPL in fact thought that CIG was an attractive, low-cost supplier. Plaintiff's Ex. 757.

NGPL also contended that it needed to reduce a potential take or pay liability of $215 million in 1983. Tr. at 3515-16; Defendants' Ex. 363. CIG experts challenged that evidence. Tr. at 2396. NGPL studies showed "a significant decrease in projected take-or-pay exposure" of $130 million through fiscal 1983. Plaintiff's Ex. 902-A. In addition, "Canadian sources accounted for $111 million of the total, with Great Lakes projected at $77 million and . . . Pro-Gas at $34 million." *Id.* Companies other than CIG thus contributed substantially to NGPL's take-or-pay problems.

The decision in *United Gas Pipeline* was also used to justify the shut-in. The administrative law judge in the *United Gas Pipeline* case invalidated minimum bill provisions similar to the provision in the Service Agreement. NGPL feared that it might be found to have acted imprudently if it continued to purchase CIG's H-1 gas and decided to reduce purchases of H-1 gas. Tr. at 5292-97. NGPL also claimed that it needed to reduce its own rates to jurisdictional customers. CIG pointed out that, after the shut-in, NGPL repeatedly purchased more expensive

gas from other suppliers. Tr. at 1649-51, 2436-39; Plaintiff's Ex. 1433, 1590.

NGPL finally asserted that it shut-in 107 million cubic feet per day of H-1 gas to reduce an oversupply of natural gas. On the day after the shut-in, however, NGPL's takes from other suppliers increased by 93 million cubic feet per day. Tr. at 2271; Plaintiff's Ex. 1986. Assuming that NGPL wanted to decrease its oversupply, to reduce its potential take-or-pay liability, or to avoid paying for costly gas, it could have done so by nominating smaller volumes in 1984. NGPL instead chose to renominate the same volumes but not to take any gas from CIG.

Evidence of specific intent alone cannot sustain a claim of attempted monopolization without corroborating evidence of conduct. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1028 (9th Cir. 1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982). Ordinary business practices typical of those used in a competitive market are not anticompetitive. *Telex Corp. v. International Business Mach. Corp.*, 510 F.2d at 925-26. The conclusion that conduct is predatory must be based not on its effect on a competitor but on its effect on competition. *Pacific Eng'g & Prod. Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d at 795.

The jury rejected NGPL's justification for its conduct and apparently decided that NGPL was not predominantly motivated by legitimate business objectives. This conclusion is based on sharply conflicting evidence and cannot be ignored simply because the Court's view might be different. *Ryder v. City of Topeka*, 814 F.2d 1412, 1418, 1420-21 (10th Cir. 1987). The evidence supports a finding that NGPL acted to destroy competition and create a monopoly. NGPL's acts are not ordinary business practices typical of those used in a competitive market. *Telex Corp. v. International Business Mach. Corp.*, 510 F.2d at 925-26. NGPL did more than merely refuse

to do business with a rival. Given an opportunity to renominate entitlements and avoid the cost and supply problems caused by the Service Agreement, NGPL instead chose to nominate the same volumes and thus to prevent CIG from offering a low-cost transportation alternative. The antitrust laws are as much violated by the prevention of competition as by its destruction. *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236 (1948). The jury could therefore conclude that NGPL's conduct was anticompetitive and that NGPL specifically intended to monopolize the long-distance transportation market for Wyoming natural gas.

B. Tortious Interference With Contract

CIG shut-in Champlin Petroleum's Whitney Canyon reserves because NGPL's shut-in created an oversupply of natural gas in CIG's system. Tr. 265-68; 994-1003; 276-77. NGPL negotiated with Champlin to acquire the Whitney Canyon reserves. A letter from NGPL to Champlin summarized their eventual agreement. The letter stated that the sale was subject to a contract between Champlin and CIG. NGPL agreed to increase the purchase price, however, if CIG released its rights to the gas. Plaintiff's Ex. 1476. When CIG attempted to negotiate revisions in the Whitney Canyon contract, Champlin insisted that CIG release its rights. CIG did so, and NGPL immediately acquired the rights to the Whitney Canyon reserves.

The jury found that NGPL tortiously interfered with CIG's contract with Champlin based upon the *Restatement (Second) of Torts* § 766A (1979). NGPL contends that neither Colorado nor Wyoming recognize § 766A. Assuming that the courts would recognize a cause of action under § 766A, NGPL argues that the Service Agreement conferred an absolute right not to buy CIG's gas and that its conduct was therefore proper. NGPL finally urges that CIG did not suffer cognizable damages under § 774A of the Restatement.

Wyoming would recognize a cause of action under § 766A. The tort of intentional interference with contract is accepted in Wyoming. *Basin Elec. Power Co-op. v. Howton*, 603 P.2d 402, 403 (Wyo. 1979). The Restatement guided the Wyoming Supreme Court in defining the tort. *See, e.g., Martin v. Wing*, 667 P.2d 1159, 1162 (Wyo. 1983) (recognizing cause of action under *Restatement (Second) of Torts* § 766B); *Wartensleben v. Willey*, 415 P.2d 613, 614 (Wyo. 1966) (recognizing cause of action under *Restatement of Torts* § 766). Having accepted sections 766 and 766B, the Wyoming Supreme Court would recognize a cause of action under § 766A.

The Restatement provides that:

> [o]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Restatement (Second) of Torts § 766A (1979). The elements of the tort include the existence of a valid contractual relationship or business expectancy, knowledge of the relationship on the part of the interferor, intentional and improper interference causing a breach or termination of the relationship, and resultant damage. *Texas West Oil and Gas Corp. v. Fitzgerald*, 726 P.2d 1056, 1062 (Wyo. 1986).

CIG and Champlin unquestionably had a valid contractual relationship. The evidence shows that NGPL knew of the existence of the contract. Plaintiff's Ex. 1476. The salient issues are whether NGPL intentionally and improperly interfered with that relationship and whether the interference damaged CIG.

NGPL argues that its conduct was justified. The Service Agreement permits NGPL to refuse delivery of CIG's gas and pay for volumes not taken. NGPL construes the take-or-pay option as an absolute right to shut-in CIG's gas. Exercising this contractual right, NGPL urges, cannot constitute an improper interference with contract.

This argument misapprehends CIG's claim. NGPL's tortious act was not the shut-in of CIG's gas. Instead CIG claimed that NGPL used the shut-in to force CIG to release the Whitney Canyon reserves so that NGPL could appropriate the rights to that gas. The argument that CIG consented to this conduct is specious. To be effective, consent must be given to the particular conduct. Action exceeding the scope of the consent is not privileged. *Restatement (Second) of Torts* § 892A & comment c. No showing was made that CIG consented to NGPL's acquisition of the Whitney Canyon reserves. NGPL's rights under the Service Agreement do not permit an interference with CIG's contractual relations with third parties.

The cases cited by NGPL to support its position are inapposite. In *J.C. Penney Co., Inc. v. Davis & Davis, Inc.*, 158 Ga. App. 169, 279 S.E.2d 461 (1981), ABS contracted to repair the defendant's buildings. ABS subcontracted with the plaintiff. Defendant rejected plaintiff's work. Although conceding that its work was defective, plaintiff brought an action for tortious interference with its contract with ABS. The court, noting that the defendant had a right to reject nonconforming work, held that plaintiff failed to show that defendant's actions were wrongful. In *Mac Enter., Inc. v. Del. E. Webb Dev. Co.*, 132 Ariz. 331, 645 P.2d 1245 (Ariz. App. 1982), the defendant leased its golf shops to ProShops which in turn sublet a concession to the plaintiff. The lease entitled the defendant to terminate the lease at any time by giving written notice. When the defendant cancelled

its lease with ProShops, the plaintiff sued for tortious interference with plaintiff's contract with ProShops. The court held that the defendant's right to cancel the lease entitled it to judgment as a matter of law. Neither case is relevant. Each simply affirms the settled rule that an action for tortious interference will not lie against a party to the contract. *See Kvenild v. Taylor*, 594 P.2d 972, 977 (Wyo. 1979). NGPL was a stranger to the contract between CIG and Champlin. An action is maintainable in these circumstances. *Id.*

The propriety of an actor's interference with another's contractual relationship depends on several factors. These include the nature of the conduct, the defendant's motive, the plaintiff's interests, the interests sought to be advanced by the defendant, the social interest in protecting each party's interests, the proximity or remoteness of the conduct to the interference, and the relations between the parties. *Toltec Watershed Improvement Dist. v. Johnston*, 717 P.2d 808, 814 (Wyo. 1986) (quoting *Restatement (Second) of Torts* § 767). Whether the conduct is justified is a question of fact for the jury. *Basin Elec. Power Co-op.—Missouri Basin Power Project v. Howton*, 603 P.2d 402, 403 (Wyo. 1979). Defendant bears the burden of proof on this issue. *Id.* at 405. If the defendant had no desire to interfere and merely knew that interference would be an incident of its conduct, the interference may be found to be proper. *Restatement (Second) of Torts* § 766A comment e. NGPL did not merely shut-in CIG's gas knowing that the shut-in might disrupt CIG's relationship with Champlin. NGPL instead acted purposefully to acquire the rights to the Whitney Canyon reserves. Ample evidence supports the jury's finding that NGPL's conduct was improper.

Similarly, the jury could rationally conclude that NGPL intentionally interfered with CIG's contract in order to acquire the Whitney Canyon reserves. Malice is not required to establish intent. *Toltec Watershed Im-*

provement Dist. v. Johnston, 717 P.2d at 814. Interference is intentional if the actor desires the result or knows that the interference is substantially certain to result. *Restatement (Second) of Torts* § 766A comment e. The evidence showed that Champlin took the initiative in opening negotiations with NGPL. Tr. at 4026. Nevertheless Champlin demanded that CIG release its rights to the Whitney Canyon reserves and NGPL immediately snatched up those rights after CIG released them. The jury could have concluded that NGPL desired this result or knew that it was substantially certain to occur. The element of intent consequently was met.

NGPL finally argues that CIG failed to prove damages resulting from NGPL's conduct. NGPL argues that such damage requires evidence that NGPL's acts made CIG's performance of the Champlin contract more expensive or burdensome.

The tort of intentional interference with contract is aimed at conduct preventing the plaintiff from performing his own contract or making performance more expensive or burdensome. *Restatement (Second) of Torts* § 767 comment a. The cause of action protects plaintiffs from losing the benefit of a third party's performance. *Id.* § 766A comment c. Plaintiffs may consequently recover damages in an amount compensating for all of the detriment proximately caused by the breach of duty. *Texas West Oil and Gas Corp. v. Fitzgerald*, 726 P.2d at 1064. Damages may include the pecuniary loss of the benefits of the contract, consequential losses for which the interference is a legal cause, or other pecuniary losses. *Restatement (Second) of Torts* § 774A & comment b. Section 766A is phrased in the alternative: conduct is tortious if it makes performance more expensive or burdensome or if it prevents the plaintiff from performing its contractual obligations. *Id.* § 766A. A showing that the defendant's acts made performance more expensive or burdensome is not required to recover damages.

CIG presented evidence showing $15,204,555 in damages resulting from demand charges paid to Canyon Compression and Overthrust Pipeline Company. Tr. at 2623-25; Plaintiff's Ex. 1777. CIG also sought restitution of lost benefits under its contract with Champlin. These damages totaled $24,026,517. Tr. at 2623-25, 2638; Plaintiff's Ex. 1777, 1775. Whether the jury erred in awarding these sums as damages will be considered later. Nevertheless, substantial evidence supports the jury's finding that CIG was damaged as a result of NGPL's intentional and improper interference with CIG's contract with Champlin Petroleum. The motion for judgment notwithstanding the verdict must therefore be denied.

C. Breach of Contract

The Service Agreement defines CIG's duties as a seller and NGPL's obligations as a buyer of natural gas. The minimum daily take provision of Section 2 states that "Buyer shall not request total daily volumes on any day hereunder less than 90 percent of the General Daily Entitlement." Section 4 contains a minimum annual bill requirement providing that:

> The minimum bill shall be on a fiscal year basis and shall be determined by multiplying the Total Annual Entitlement by a factor of 90 percent, such volume hereinafter referred to as "Minimum Volume" . . . .
>
> In the event Buyer's actual purchases for the fiscal year are less than the Minimum Volume, then any deficiency shall be billed at the unit rate under Rate Schedule F-1. . . .

The jury found that NGPL was in breach of the Service Agreement. NGPL contends that the lack of a filed rate with the Federal Energy Regulatory Commission ("FERC" or "the Commission") and the res judicata effect of the Commission's actions bar recovery of H-1

fixed costs under Section 2. NGPL further argues that Section 4 is the exclusive remedy for a breach of Section 2. NGPL finally argues that CIG's course of performance vitiates any breach of contract claim.

1. FERC Orders and Regulations

On October 18, 1983, a FERC Administrative Law Judge found the minimum bill provisions of Sections 2 and 4 to be unjust and unreasonable. *Colorado Interstate Gas Co.*, No. RP82-54-000, 25 FERC ¶ 63,012 (1983). The Commission affirmed the ALJ on May 25, 1984, and ordered CIG to eliminate variable costs from its minimum bill to NGPL. *Id.* ¶ 61,315 at 61,583, 61,584 (1984). The Commission said, however, that "our conclusion that CIG's minimum bill to Natural is not just and reasonable does not mean that CIG may not employ a minimum bill in serving that customer." *Id.* at 61,583.

CIG filed amended tariffs in an attempt to comply with the May 25, 1984 order. CIG dropped variable costs from the minimum bill but also sought to amend the Service Agreement to permit collection of minimum bill deficiency payments using the H-1 rate for H-1 deficiences and the F-1 rate for F-1 deficiencies. The compliance filings were rejected, and CIG appealed to the Commission. *Colorado Interstate Gas Co.*, No. RP82-54-014, 29 FERC ¶ 61,124 at 61,243 (1984). CIG argued before the Commission that the May 25, 1984 order permitted recovery of fixed costs allocable to NGPL under the H-1 and F-1 rates. On October 31, 1984, FERC rejected the appeal, reasoning that:

> . . . the May 25, 1984 order did not definitively rule on the proper level of fixed cost recovery in CIG's minimum bill. Instead, the Commission found that the record was insufficient to determine whether the existing level of fixed cost recovery . . . in the minimum bill is just and reasonable. We therefore did

> not order any changes in the existing level of fixed cost recovery.
>
> . . . [Order No. 380-C] removed variable costs from minimum commodity bills and did not address what level of fixed costs should be included. *In fact, the Commission expressly declined to rule on whether any fixed costs should be recovered through a minimum bill.*

Id. at 61,244 (emphasis added). CIG appealed this decision. The United States Tenth Circuit Court of Appeals affirmed, holding that the Commission's decision was rational and supported by substantial evidence. *Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 811 (10th Cir.1986). A subsequent compliance filing was accepted by FERC. 30 FERC ¶ 61,073 (1985).

NGPL concludes that FERC's actions preclude recovery of damages predicated upon H-1 fixed costs. It argues that FERC allowed CIG to charge only the F-1 fixed cost of gas not taken, that CIG thus has no H-1 tariff on file with FERC, and that damages based on H-1 fixed costs are consequently barred by the filed rate doctrine and principles of res judicata. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584, 101 S.Ct. 2925, 2933, 69 L.Ed.2d 856 (1981) (courts may not award damages based on rates other than those approved by FERC).

The Commission's orders of May 25 and October 31, 1984 do not bar recovery of damages which are calculated from H-1 fixed costs. The emphasized portion of the October 31 order states that FERC had not decided whether fixed costs were recoverable. CIG's compliance filings were rejected not because FERC determined that H-1 fixed costs were not recoverable but rather because CIG's compliance filings exceeded the scope of the May 25 order, which did not specifically permit modification of the minimum bill to recover fixed costs. *See Colorado Interstate Gas Co. v. FERC*, 791 F.2d at 810.

Other FERC orders reinforce this view. FERC Order No. 380 precludes recovery of the variable costs of gas not taken. *FERC Statutes and Regulations* ¶ 30,571 (1984) (codified at 18 C.F.R. § 154.111 (1986)). Order No. 380-C applied Order No. 380 to minimum bill provisions. *Id.* ¶ 30,607 at 31,197. The Commission noted however, that "[b]y making the rule applicable to . . . minimum take provisions, *no additional refiling requirements are imposed on the pipeline.*" *Id.* at 31,196 (emphasis added). Rate schedules must be refiled only if they fail to state purchase gas costs separately. 18 C.F.R. § 154.111(a)(3)(ii). CIG's commodity rate subsumed H-1 and F-1 fixed costs. This tariff remained effective to the extent it excluded recovery of variable costs. Order No. 380-D, 29 FERC ¶ 61,332 at 61,692 (1984). CIG therefore had a filed H-1 rate.

The Commission's order of June 19, 1985 demonstrates that FERC did not abrogate the minimum daily take requirement of Section 2. In February 1987, NGPL filed a motion before FERC to eliminate the minimum take provision. The Commission denied the motion, concluding that the relief sought by NGPL was "not consistent with our prior orders in this case or with our regulations." *Colorado Interstate Gas Co.*, No. RP82-54-017, 31 FERC ¶ 61,325 at 61,743 (1985). The Commission, quoting Order No. 380-D, pointed out that:

> [m]inimum take provisions remain currently effective except to the extent that they operate to recover variable costs for gas not taken by the buyer. The Commission in Order No. 380-C only eliminated the recovery of *variable* costs under a pipeline's minimum take provision. In other words, minimum take provisions are treated in the same manner as minimum commodity bills. The *fixed* cost component included in a selling pipeline's commodity rate may still be recovered by that seller for the number of units of gas specified in the minimum take provision

> even where the buyer does not take that specified minimum amount.

Id. (emphasis in original). The Commission's determination that "the prior orders in Docket No. RP82-54 [do] not require CIG to eliminate the minimum take provision from its service agreement," *id.*, defeats NGPL's argument. FERC exercised its power to modify Section 2 but expressly affirmed CIG's right to recover fixed costs under the minimum take provision. The Commission's actions do not require the Court to set aside the jury's verdict.

2. Exclusive Remedy and Course of Performance

NGPL urges that Section 4 creates an exclusive remedy for breach of the Service Agreement. As NGPL reads it, the Service Agreement requires that NGPL pay the minimum bill as provided in Section 4 if NGPL chooses not to purchase or receive 90 percent of the General Daily Entitlement. Section 4 must therefore be "the only remedy contained in the Service Agreement." NGPL Brief at 46. This argument ignores the basic principle that contractual remedies are optional unless "expressly agreed to be exclusive." U.C.C. § 2-719(1)(b). This subsection creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. Parties who intend a contractual provision to constitute a sole remedy must clearly express that intention. *Id.* comment 2. NGPL contends, however, that the record rebuts the U.C.C.'s presumption of nonexclusive remedies.

Every contract should be construed as a whole, giving effect to each portion of the instrument. *Colorado Milling & Elevator Co. v. Chicago, Rock Island & Pacific R.R. Co.*, 382 F.2d 834, 836 (10th Cir.1967). NGPL argues that construing Section 2 as an independent obligation makes Section 4 irrelevant, because a failure to take the General Daily Entitlement under Section 2

would produce a larger minimum annual bill than Section 4, which averages daily takes over a year.

This reading has two flaws. First, Section 4 does not provide that daily takes will be averaged in arriving at the annual minimum bill. It instead states that the minimum annual bill is determined by multiplying 90 percent times the "Total Annual Entitlement" (defined in Section 1 as 78,150,000 Mcf). This calculation produces the "Minimum Volume." The Minimum Volume is determined "on the basis of the average of several General Daily Entitlements" only "[i]f the specified General Daily Entitlement is revised during the fiscal year." The language of the Service Agreement does not support NGPL's argument. Second, construing Section 4 as an exclusive remedy reads Section 2 out of the Service Agreement. Sections 2 and 4 can be harmonized without eviscerating Section 2. The Service Agreement was executed in 1982, a time when natural gas was in relatively short supply and when costs were generally high. Section 2 assures NGPL of a minimum daily volume of 170,000 Mcf during the winter (the "Swing Period"). NGPL is thus ensured a supply of natural gas during periods of high demand and short supply. In return, NGPL agreed to take 90 percent of the General Daily Entitlement, thereby assuring CIG's recovery of the high costs of purchasing and shipping the gas. Section 4 then sets forth the billing mechanism for the transaction. The two provisions can thus be given independent yet consistent content.

NGPL next argues that the jury ignored the parties' course of performance. The core of the argument is that CIG only tendered annual bills under Section 4. Whenever reasonable, a contract's express provisions and any course of performance should be given a consistent construction. U.C.C. § 2-208(2). The express terms of the contract govern in a conflict with the parties' course of performance. *Id.; KN Energy, Inc. v. Great Western*

Sugar Co., 698 P.2d 769, 770 (Colo.1985) (en banc). Nothing in Section 4 requires CIG to submit a claim under Section 4 for a breach of Section 2. CIG's course of performance is thus consistent with the express terms of the Service Agreement.

The terms of the U.C.C., a consistent construction of Sections 2 and 4, and the parties' course of performance support a conclusion that Section 4 is not an exclusive remedy for breach of the Service Agreement. CIG was accordingly entitled to resort to the remedies specified in the U.C.C. FERC exercised its statutory powers to modify Section 2 but did not preclude recovery of H-1 costs as damages in this action. Presented with this very issue, the Commission in its order of June 19, 1985, declined to challenge this suit as a collateral attack on its prior orders. *See Colorado Interstate Gas Co.*, No. RP82-54-017, 31 FERC ¶ 61,325 at n. 2. NGPL's motion for judgment notwithstanding the verdict on CIG's breach of contract claim must therefore be denied.

D. Breach of the Duty of Good Faith and Fair Dealing

The Uniform Commercial Code and the common law each impose on the parties to a contract the duty to perform in good faith. U.C.C. § 1-203; *Restatement (Second) of Contracts* § 205 (1981). Good faith normally requires "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201(19). In the case of merchants, good faith demands both "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.* § 2-103(1)(b). The implied covenant enjoins each party to "do nothing destructive of the other party's right to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish its purpose." *Conoco, Inc. v. Inman Oil Co., Inc.*, 774 F.2d 895, 908 (8th Cir.1985).

The jury found that NGPL violated its duty of good faith and fair dealing under the Service Agreement.

NGPL advances four reasons to set aside the verdict. It first contends that the duty of good faith and fair dealing does not afford an independent cause of action. Even if a cause of action does exist, the exercise of valid contractual rights cannot violate the duty. NGPL further argues that no evidence supports the jury's verdict and, finally, that CIG failed to prove the reasonable commercial standards of fair dealing within the natural gas industry.

A majority of jurisdictions recognize the duty to perform a contract in good faith. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv.L.Rev. 369 (1980). As one court has observed, "it is unnecessary to speculate upon . . . acceptance or rejection [by the applicable state supreme court] of the modern doctrine of 'obligation to perform in good faith.' The doctrine . . . is simply a rechristening of fundamental principles of contract law." *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C.Cir.1984). The Colorado and Wyoming legislatures adopted the U.C.C.'s definition of good faith. Colo.Rev.Stat. § 4-1-203 (1973); Wyo.Stat. § 34-21-122 (1977). Although the parties have not cited any relevant decision by the Colorado Supreme Court, the lower courts in that State seem inclined to recognize a cause of action for breach of the duty. *Layne v. Fort Carson Nat'l Bank*, 655 P.2d 856, 857 (Colo.App. 1982) (affirming summary judgment in favor of a lender on claim that lender violated the good faith requirements of the U.C.C.); *Ruff v. Yuma County Transp. Co.*, 690 P.2d 1296, 1298 (Colo.App. 1984) (recognizing applicability of *Restatement (Second) of Contracts* § 205). Wyoming's Supreme Court has implicitly recognized a cause of action for breach of the duty. *Wendling v. Cundall*, 568 P.2d 888, 890 (Wyo.1977) (applying U.C.C. good faith standard to contract for the sale of real estate). *See also Garner v. Hickman*, 709 P.2d 407, 411 (Wyo.1985) (discussing lender's duty of good faith and fair dealing in action for defective construction of a mod-

ular home). An independent cause of action exists for breach of the duty of good faith and fair dealing.

NGPL argues that, even if a cause of action is available, exercise of express contractual rights cannot constitute a breach of the duty. Section 1 of the Service Agreement permits NGPL to "pay for or to purchase and receive . . . [specified] quantities of natural gas." The Service Agreement does not obligate NGPL to accept deliveries of H-1 gas, NGPL argues, and thus it cannot breach the duty of good faith by refusing to do so.

In support of its argument, NGPL cites *VIR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773 (S.D.N.Y. 1969),[3] where plaintiff was to receive commission payments for a specified term, but the contract also provided that Goodyear could terminate the payments at any time with or without cause. *Id.* at 775. Plaintiff alleged that Goodyear failed to operate the business in good faith by willfully causing the business to deteriorate, thus depriving plaintiff of part of its consideration. The District Court granted Goodyear's motion for summary judgment, reasoning that a party cannot breach the duty of good faith and fair dealing by conduct expressly permitted by the contract. *Id.* at 778.

This view was rejected in *Tymshare*. The court acknowledged that when a contract is drawn to leave decisions absolutely to the uncontrolled discretion of one of the parties the issue of good faith is irrelevant. *Tymshare, Inc. v. Covell*, 727 F.2d at 1153. The Court noted, however, that "to say that every expressly conferred con-

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[3] NGPL also cites the decision in *Bill's Coal Co., Inc. v. Board of Pub. Util.*, 682 F.2d 883 (10th Cir.1982). That case is inapposite. The court held that, absent some effect on either party's performance, urging an interpretation of a contract which does not reflect the parties' intent is not a breach or repudiation of a contract. *Id.* at 885. NGPL did not merely espouse a particular interpretation of the Service Agreement. Its actions clearly affected both parties' performance.

tractual power is of this nature is virtually to read the doctrine of good faith . . . out of existence." *Id.* at 1153-54.

In contrast to the facts in *VIR*, the Service Agreement limits NGPL's discretion. Section 2 states that "[v]ariations in daily takes may be made at Buyer's election at H-1 delivery points *to meet its varying load conditions.*" This requirement limits NGPL's right to refuse deliveries of H-1 gas. NGPL may not refuse deliveries for any reason; it can do so only "to meet its varying load conditions." If NGPL's discretion was unbounded, its promise to take or pay would be illusory.

Any rights NGPL possessed had to be exercised in good faith to effectuate the parties' intent. *Boone v. Kerr-McGee Oil Indus., Inc.*, 217 F.2d 63, 65 (10th Cir. 1954). The question is whether substantial evidence supports a finding that NGPL failed to exercise its contractual rights in good faith.

Wyoming's Supreme Court, discussing the U.C.C. standard of good faith, said that good faith consists of "an honest intention to abstain from taking any unconscientious advantage of another, even through the forms of technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." *Wendling v. Cundall*, 568 P.2d 888, 890 (Wyo. 1977) (quoting *Cone v. Ivinson*, 4 Wyo. 203, 33 P. 31 (1893)). The test requires honesty of intent rather than diligence or nonnegligence. *Id.*

From the evidence presented at trial, the jury could have reasonably concluded that NGPL failed this test. For example, NGPL renominated its full capacity under the Service Agreement, yet refused to accept delivery of those volumes when the renomination became effective. NGPL also singled out CIG for minimal or zero takes and failed to follow its own gas scheduling policies. CIG adduced evidence from which the jury could have concluded

that NGPL lied to CIG about the shut-in. *See supra* text at 1467-68; *see also* Tr. at 2274. This alone would show that NGPL failed to act with the "honesty of intent" required by § 1-201.

NGPL argues, however, that CIG failed to prove the reasonable commercial standards of fair dealing within the natural gas industry. CIG's expert, Mr. Morgan, pointed out that reasonable standards in the industry originate in the need for long-term stability due to the high cost of pipeline construction. Mr. Morgan testified that reasonable commercial standards are incapable of precise definition and instead must be determined from the facts of each case. Tr. at 3197-98. The courts support this approach. *See Tymshare, Inc. v. Covell*, 727 F.2d at 1152 (quoting Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va.L.Rev. 195, 201 (1968) (good faith is a concept without general meaning)). Instead of providing a formula, Mr. Morgan gave specific examples of conduct which would not comport with reasonable standards within the industry. This evidence sufficiently defined industry standards of fair dealing.

An opposite conclusion does not assist NGPL. The U.C.C. requires observance of reasonable commercial standards of fair dealing *and* honesty in fact in the transaction. U.C.C. § 2-103(1)(b). Both requirements must be satisfied to meet the duty of good faith. Here, evidence showed that NGPL did not act honestly in fact in its transactions with CIG. The jury could reasonably find a breach of the duty of good faith and fair dealing on NGPL's part. *See Neumiller Farms, Inc. v. Cornett*, 368 So.2d 272 (Ala. 1979) (a party rejecting another's performance for feigned reasons does not exercise discretion within the parties' contemplation). The verdict thus cannot be set aside.

E. Conclusion

Despite its forceful arguments, NGPL failed to meet the demanding standards required to upset a jury verdict. The jury found in favor of CIG after considering sharply conflicting testimony from which reasonable minds could draw different conclusions. In these circumstances, the Court must defer to the jury. A highly distinguished practitioner articulated the reason for the courts' deference to jury verdicts:

> It is possible to take the record of any trial and by minute dissection and post-facto reasoning demonstrate that witnesses for either side made egregious errors or lied. Then by ascribing critical weight to the exposed facts, the conclusion is reached that the verdict was fraudulently obtained.
>
> . . . .
>
> The fallacy in this approach is that it assumes that all the evidence for the winning side must be believed by the jury, or it would not decide as it did. It ignores the jury's right to be selective of a witness' story and also the reality of conflict of testimony, which the jury must resolve by applying its common sense and keen observation of the witnesses. . . . The jury may choose to believe one witness, and often does, against five witnesses who testified to the contrary.
>
> . . . .
>
> Nor does it follow that because there is alloy in some pieces of gold on one side of the scales that the jury's recognition of its meretricious nature requires it to ignore the decisive tipping of the scales from other weights on the same scale. The opposite scale might be lighter, too. . . .
>
> The point is that it is the composite effect which is determinative, not a dissection of each fact as if it were the whole.

L. Nizer, *The Implosion Conspiracy* 6-7 (1973).

The standards for judgment notwithstanding the verdict require the Court to uphold the jury's action if it finds rational support in the evidence. *See supra* text at 1457-58. Substantial conflicting evidence supports the jury's verdict in favor of CIG. NGPL's motion for judgment notwithstanding the verdict must therefore be denied.

II. DAMAGES

NGPL attacks CIG's proof of damages. At a minimum, NGPL contends, a remittitur must be granted as to $117,000,000 awarded to CIG as future damages, $53,000,000 in Northwest Pipeline Company minimum bill payments, and $24,000,000 in restitutionary damages for tortious interference with contract. NGPL urges in the alternative that judgment notwithstanding the verdict or new trial is required because:

(1) Future fixed costs cannot be recovered as damages for breach of the Service Agreement;

(2) Minimum bill payments CIG owes to Northwest Pipeline Company are nonrecoverable consequential damages;

(3) CIG's proof of damages was impermissibly speculative;

(4) The jury ignored offsetting benefits accruing to CIG as a result of NGPL's actions;

(5) The jury awarded improper damages for tortious interference with contract; and

(6) CIG failed to prove antitrust damages.

Each contention will be examined in turn.

A. Breach of Contract Damages

The jury found that CIG suffered $159,797,156 in damages as a result of NGPL's breach of contract. This is the sum of CIG's lost profits ($106,580,792) plus mini-

mum bill payments CIG owes to Northwest Pipeline Company ($53,216,364). The Court deleted the award from the judgment because recovery of contract damages would have duplicated recovery under the antitrust claim. NGPL nevertheless challenges the award on two grounds. Its first argument is that future fixed costs due under the Service Agreement cannot be recovered as damages for breach of contract. NGPL also argues that CIG's minimum bill payments are nonrecoverable consequential damages. Both elements of damage, however, are recoverable under the provisions of the Uniform Commercial Code.

NGPL argues that future damages cannot be recovered when a contract is still being performed. The Service Agreement continues in force until FERC permits the parties to abandon it. NGPL therefore concludes that, absent a total breach of contract, CIG may not recover future damages based on fixed cost payments not yet due under the Service Agreement.

When a buyer wrongfully rejects goods or repudiates with respect to a part or the whole, the seller may recover damages for nonacceptance. U.C.C. § 2-703. The measure of damages for the buyer's nonacceptance or repudiation is the difference between the market price at the time and place of tender and the unpaid contract price, plus any incidental damages, but less expenses saved in consequence of the buyer's breach. *Id.* § 2-708(1). Lost profits are available as an alternative measure of damages if the market-contract price differential in 2-708(1) is inadequate to put the seller in as good a position as if the buyer had fully performed. *Id.* § 2-708(1).

A market must exist in order to recover market based damages under § 2-708(1). Absent a market for the goods, § 2-708(1) is an inadequate measure of damages. *Autonumerics, Inc. v. Bayer Indus., Inc.*, 144 Ariz. 181, 696 P.2d 1330, 1340 (Ariz.App.1984). *Accord Copymate Marketing Ltd. v. Modern Merchandising, Inc.*, 34 Wash. App. 300, 660 P.2d 332 (1983); *Neumiller Farms,*

Inc. v. Cornett, 368 So.2d 272 (Ala.1979); *Timber Access Indus. Co. v. U.S. Plywood-Champion Papers, Inc.*, 263 Or. 509, 503 P.2d 482 (1972); *Anchorage Centennial Dev. Co. v. Van Wormer & Rodrigues, Inc.*, 443 P.2d 596 (Alaska 1968). In this case, the shut-in effectively prevented CIG from transporting natural gas. No market existed for CIG's gas so long as NGPL refused to take. The market-contract price measure of damages in § 2-708 (1) does not adequately measure CIG's damages. CIG can be made whole only by receiving its lost profits under the Service Agreement and consequently is entitled to recover future fixed costs pursuant to § 2-708(2).

Similarly, CIG's minimum bill payments to Northwest Pipeline Company are recoverable as reasonable overhead under § 2-708(2) or as incidental damages under § 2-710. In order to supply NGPL with the volumes required under the Service Agreement, CIG purchased natural gas from Northwest Pipeline Company. CIG has incurred substantial minimum bill payments to Northwest Pipeline Company for the gas CIG is unable to take because of the shut-in. The minimum bill payments were awarded to CIG as damages for breach of the Service Agreement. NGPL urges that these payments are nonrecoverable consequential damages.

Consequential damages are generally nonrecoverable. U.C.C. § 1-106(1). Sellers may, however, recover incidental damages. A seller's incidental damages include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." *Id.* § 2-710. The goal is to put the seller in the same position as if the buyer had performed. *Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*, 697 F.2d 481, 483 (2d Cir.1983). CIG's minimum bill payments can be viewed as commercially reasonable charges incurred in stopping delivery as a result of

NGPL's breach. These expenses are recoverable under § 2-710, and the jury properly awarded them as damages to CIG.

B. CIG's Proof of Damages and Offsetting Benefits Received by CIG

NGPL contends that the testimony of CIG's damage expert, Dr. Rhodes, was based on erroneous assumptions. Especially in antitrust litigation, the burden of proving the amount of damages is less than that required to prove the fact of damage. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1526 (10th Cir.1984), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). If the calculations upon which damages, including lost profits, are reasonably estimated and if the record supports the expert's assumptions, the calculations are a valid measurement of damage. *Id.* (quoting *King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir.1981).

NGPL's objections go to the weight and credibility of Dr. Rhodes' testimony. Dr. Rhodes explained his assumptions and their inadequacies to the jury. Counsel for NGPL cross-examined Dr. Rhodes at length in an attempt to discredit his testimony. Dr. Rhodes grounded his calculations on CIG's accounting records and tariff filings. Tr. at 2845-46; 2848-51; 2853-54. The calculations were reasonably estimated and were supported by the record. The weight to be accorded Dr. Rhodes' testimony was consequently a question for the jury. *State Office Systems, Inc. v. Olivetti Corp. of America*, 762 F.2d 843, 846 (10th Cir.1985); *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 616 (10th Cir.1984). The jury believed Dr. Rhodes' testimony and rejected NGPL's contention that CIG benefitted from the release of Champlin's Whitney Canyon gas. CIG presented evidence that a reasonable possibility existed of renegotiating the price of the Whitney Canyon gas. The jury's verdict was not against the weight of the evidence.

C. Tortious Interference with Contract

NGPL challenges the jury's damage award for tortious interference with contract. That award included damages incurred as a result of demand charges payable to Overthrust and Canyon Compression to ship the Whitney Canyon gas, plus $24,026,517 in restitution for profits received by Trailblazer Pipeline Company for transporting Whitney Canyon gas.

NGPL would limit damages for tortious interference with contract to extra expenses incurred by CIG in performing its contract with Champlin. The measure of damages for tortious interference with contract, however, is "the amount which will compensate for all the detriment proximately caused by the breach of duty." *Martin v. Wing*, 667 P.2d 1159, 1163 (Wyo.1983). Substantial evidence supports the conclusion that the demand charges payable to Overthrust and Canyon Compression were incurred as a proximate result of NGPL's wrongful interference.

NGPL next claims that restitution is not an appropriate remedy for tortious interference with contract. Damages for tortious interference are based in tort, not in contract. *Restatement (Second) of Torts* § 774A comment d. Restitution has long been an accepted remedy for tortious interference with contract. *See, e.g., Zippertubing Co. v. Teleflex, Inc.*, 757 F.2d 1401 (3rd Cir. 1985); *National Merchandising Corp. v. Leyden*, 370 Mass. 425, 348 N.E.2d 771 (1976); *Automatic Laundry Serv. v. Demas*, 216 Md. 544, 141 A.2d 497 (1958); *Schechter v. Friedman*, 141 N.J.Eq. 318, 57 A.2d 251 (Ct.Err. & App. 1948); *Caskie v. Philadelphia Rapid Transit Co.*, 321 Pa. 157, 184 A. 17 (1936); *Second Nat'l Bank v. M. Samuel & Sons, Inc.*, 12 F.2d 963 (2d Cir.), *cert. denied*, 273 U.S. 720, 47 S.Ct. 110, 71 L.Ed. 857 (1926); *Federal Sugar Refining Co. v. United States Sugar Equalization Bd.*, 268 F. 575 (S.D.N.Y.1920). Restitution is available as a remedy, and CIG was en-

titled to restitution of profits for NGPL's tortious interference with contract.

Care must be taken, however, "to avoid gouging even the consciously wrong defendant." D. Dobbs, *Law of Remedies* § 6.4 at 465 (1973). Only one-third of the Trailblazer Pipeline Company is owned by NGPL. Forcing it to disgorge funds it did not receive would unfairly penalize NGPL. A remittitur of two-thirds of $24,026,517, the amount awarded as restitution for profits received by Trailblazer Pipeline, is appropriate. The sum owed by NGPL totals $8,008,839. The Court will therefore grant a remittitur in the amount of $16,017,678.

D. Antitrust Damages

Recovery of treble damages requires proof of antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.* The injury must reflect the anticompetitive effect of the violation or of the anticompetitive acts made possible by the violation. It should be the type of loss that the claimed violation would be likely to cause. *Id.* The antitrust violation in this case is NGPL's attempt to monopolize the market for the long distance transportation of Wyoming natural gas. To satisfy the *Brunswick* standard CIG had to show that its injury and resulting damages were causally related to a) the long distance transportation of b) Wyoming natural gas.

CIG claimed three elements of antitrust damage: demand charge losses incurred by CIG as a result of the shut-in; minimum bill payments CIG owes Northwest Pipeline as a result of the shut-in; and lost profits. Demand charges are contractual payments required to reserve transportation capacity through a pipeline. Tr. at 2623. The Northwest Pipeline bill is a sum CIG must

pay to Northwest Pipeline for gas it is unable to ship due to the shut-in. Tr. at 2634-35. As explained earlier, the Northwest Pipeline payments and CIG's demand charge losses are causally related to the antitrust violation.

Lost profits are the remaining element of damage which must be considered. CIG's damage expert, Dr. Rhodes, testified that CIG's lost net profits (discounted to present value) totaled $106,580,792. He reached this figure by adding CIG's past lost net profits to CIG's future net lost profits. Tr. at 2564-65; Plaintiff's Ex. 1768. Dr. Rhodes calculated past lost net profits by subtracting F-1 from H-1 lost profits. Tr. at 2561. He subtracted F-1 lost profits from past damages because NGPL had paid those costs in its minimum bill payments. Tr. at 2771. He included future F-1 lost profits in calculating future net lost profits, however, because NGPL had not paid those costs. Dr. Rhodes therefore calculated future net lost profits by adding future H-1 lost net profits to future F-1 lost net profits. Tr. at 2610. CIG's total future net lost profits totaled $60,388,000.

Certain volumes of gas delivered at the H-1 delivery point are transported from Wyoming. Tr. at 229-30. In contrast, F-1 gas is produced from wells in Oklahoma and flows through gathering lines to the F-1 delivery point in Forgan, Oklahoma. None of the gas sold under F-1 is transported through the main transmission system. Tr. at 229.

Given CIG's antitrust theory, damages based upon F-1 costs are not recoverable as antitrust damages. F-1 gas is not produced in Wyoming and is not shipped in the long distance transportation market for Wyoming gas. *Ipso facto*, damages based upon lost profits for F-1 gas are unrelated to NGPL's attempt to monopolize the long distance transportation of Wyoming natural gas. Consequently, future net lost profits based upon F-1 fixed costs are not the type of injury that the antitrust violation

was likely to produce. Losses of future F-1 profits do not flow from that which made NGPL's actions unlawful. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. The jury erred in awarding these losses as antitrust damages, and NGPL is entitled to a remittitur of damages based upon future F-1 lost profits.

The total amount of future net lost profits was $60,388,000. Dr. Rhodes' testimony and his damage summary (Defendants' Ex. 3036) does not disclose what portion of that amount consists of future H-1 lost profits and what portion consists of future F-1 lost profits. The record's silence prevents the Court from deleting only F-1 lost profits. The Court will therefore grant a remittitur of all future net lost profits after trebling.

As explained above, CIG is entitled to recover future lost profits as contract damages. *See supra* text at 1477-78. The jury awarded CIG $159,797,156 in damages for breach of contract. At CIG's suggestion and with CIG's consent, the Court reduced the judgment by this amount in order to prevent double recovery. Included in the total award for contract damages was $106,580,792 for lost profits. This sum includes the $60,388,000 in future net lost profits. The jury therefore awarded CIG its future net lost profits as contract damages. The Court will not impose additional liability on NGPL by allowing CIG to recover future net lost profits as damages for breach of contract, because the jury previously awarded these sums as contract damages. Accordingly, the Court will grant a remittitur of $181,164,000 ($60,388,000 trebled) and reinstate the jury's award of contract damages in the amount of $60,388,000.

III. NEW TRIAL

NGPL contends that it was denied due process in the trial of this case. A new trial may be granted under Fed.R.Civ.P. 59 to ensure that justice is done. *Holmes v. Wack*, 464 F.2d 86, 88-89 (10th Cir.1972). The bur-

den of showing harmful error, however, rests with the moving party. 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2803 at 32 (1973). NGPL's contentions are without merit, and its motion for a new trial will be denied.

The first point of controversy is a poem written by a juror during the trial. The juror gave the poem to the Court's law clerk, who reported the contact to the Court. Contrary to counsel's assertion, neither the Court nor its staff circulated copies to the jury. The Court instead gave copies to counsel to inform them of the development. Counsel failed to request any remedial action by the Court but instead waited to object until long after a verdict was returned. NGPL consequently wavied its claim of error. *General Motors Corp. v. Walden*, 406 F.2d 606, 610 (10th Cir.1969). Moreover, NGPL exaggerates the significance of the poem. Interpreting the poem as a criticism of NGPL's witnesses is pure speculation. The poem reflects fatigue caused by a lengthy trial requiring the jurors' intense concentration. It does not suggest that the jury was biased or improperly formed an opinion. Indeed, the poem is not cognizable evidence of juror misconduct. Fed.R.Evid. 606(b); *United States v. Jelsma*, 630 F.2d 778, 779 (10th Cir.1980). Substantial evidence supported the jury s decision. This shows that the jury was not inflamed or biased against NGPL.

NGPL argues that the Court incorrectly instructed the jury on the obligations imposed by the Service Agreement. NGPL particularly objects to "the failure to instruct the jury that Natural had no obligation to take CIG's gas." NGPL Brief at 45 n. 26. The jury was expressly instructed, however, that it could not find a breach of the Service Agreement unless NGPL failed to request the minimum volumes specified in the Service Agreement *and* failed to pay the proper fixed costs of volumes not taken under Section 2. Jury Instruction No. 14. This instruction is substantially the same as NGPL's

Revised Proposed Instruction No. 30 and makes clear that NGPL was not in breach of contract merely by refusing to take CIG's gas.[4]

At CIG's request, the Court instructed the jury that CIG claimed that NGPL sought to create a monopoly for the Trailblazer System. The pretrial order stated that NGPL attempted to create a monopoly for the Trailblazer Pipeline. NGPL asserts that permitting CIG to change its antitrust theory at the jury instruction conference defeated NGPL's defense.

The instructions were consistent with the evidence adduced at trial. CIG moved to amend the pleadings, pursuant to Fed.R.Civ.P. 15(b), to conform to the evidence. The Court granted the motion without objection from NGPL, and the pretrial order was consequently amended. By failing to object to CIG's evidence and by producing its own evidence on the issue, NGPL impliedly consented to trial of the amended issues. *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456-57 (10th Cir.1982).

NGPL contends that the Court improperly excluded testimony not fully designated prior to trial. Ample notice was given to NGPL of the necessity to provide specific witness designations. NGPL did not object to the requirement that both parties submit simultaneous witness designations one month prior to trial. NGPL's unsupported assertion that the excluded testimony resulted in prejudice does not meet the required showing. *Andrews v. Olin Mathieson Chem. Corp.*, 334 F.2d 422, 428 (8th Cir. 1964).

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[4] NGPL also claims that Jury Instruction No. 16 confused the jury by incorerctly stating the effect of FERC's orders. This contention is addressed earlier in the opinion. *See supra* text at 1471-73 NGPL also asserts that the Court excluded relevant evidence of FERC proceedings. The Court, however, permitted witnesses to testify concerning any FERC order that formed the basis of their opinion or influenced their actions.

Evidence that NGPL relied on the advice of counsel was rejected by the Court. NGPL resisted discovery on this issue. A party refusing to permit discovery on the advice of counsel may not assert the defense at trial. *International Tel. & Tel. Corp. v. United Tel. Co. of Florida*, 60 F.R.D. 177, 186 (M.D.Fla.1973). Bias against NGPL did not motivate the Court. NGPL offered its brief in support of the proffered evidence moments before the matter was argued. The Court provisionally excluded the evidence and, after studying NGPL's memorandum, reaffirmed its ruling. NGPL's assertion that CIG was permitted to present evidence of its reliance on the advice of counsel distorts the facts. NGPL raised this issue on cross-examination of a CIG witness. Tr. at 1211-13.

The Court excluded NGPL's evidence that CIG threatened to intervene in FERC proceedings. The *Noerr-Pennington* Doctrine bars such evidence. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Nothing suggests an abuse or corruption of the judicial process justifying admission of the evidence under the "sham exception" to the rule. *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1176-77 & n. 7 (10th Cir.1982).

NGPL contends that permitting the claim of breach of the duty of good faith to go to the jury allowed CIG to mislead and inflame the jury during closing arguments. A cause of action does exist for breach of the duty. *See supra* text at 1474-76. The claim was properly submitted to the jury. NGPL failed to object to CIG's closing argument at trial. Its present challenge is untimely. *Computer Systems Eng'g., Inc. v. Qantel Corp.*, 740 F.2d 59, 69 (1st Cir.1984).

Carefully comparing the record with NGPL's assertions reveals no prejudice requiring a new trial. The motion for a new trial must be denied. It is therefore

ORDERED that defendants' motions for judgment notwithstanding the verdict or for new trial be, and the same hereby are, denied. It is further

ORDERED that unless plaintiff Colorado Interstate Gas Company or its attorney remits the sum of $197,181,678 on the judgment entered herein with ten (10) days from the date of this order, the verdict of the jury be, and the same hereby is, set aside and a new trial will be ordered.

If plaintiff or its attorney remits the sum of $197,181,678 the judgment entered herein within ten (10) days from the date of this order, the motion for a new trial is denied, and the jury's award for breach of contract, as previously reduced by the Court, is reinstated nunc pro tunc in the amount of $60,388,000. In this event the clerk of the court is directed to correct the judgment heretofore entered in this case to conform to the amount of the verdict as herein reduced and reinstated.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 87-2109
87-2123

COLORADO INTERSTATE GAS COMPANY,
Plaintiff-counter-claim-defendant—Appellee,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
NGPL-TRAILBLAZER, INC.,
Defendants-counter-claimants—Appellants,

v.

WYOMING INTERSTATE COMPANY, LTD., and
THE COASTAL CORPORATION,
Counterclaim-Defendants-Appellees,

MIDCON VENTURES, INC.,
Counter-claimant,

and

FEDERAL ENERGY REGULATORY COMMISSION,
Amicus Curiae.

ORDER

Filed December 12, 1989

Before HOLLOWAY, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, and BRORBY, Circuit Judges.

This matter comes on for consideration of appellee Colorado Interstate Gas Company's petition for rehearing and suggestion for rehearing en banc filed in the captioned cases.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judges McKay, Seymour and Ebel did not participate.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX D

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL86-53-000

SOUTHERN COMPANY SERVICES, INC.

Docket No. EL86-57-000

GULF STATES UTILITIES COMPANY

v.

ALABAMA POWER COMPANY, GEORGIA POWER COMPANY, GULF POWER COMPANY, MISSISSIPPI POWER COMPANY, and SOUTHERN COMPANY SERVICES, INC.

ORDER SETTING COMPLAINT FOR HEARING, GRANTING PETITION FOR A DECLARATORY ORDER IN PART AND DENYING IN PART, AND CONSOLIDATING DOCKETS

(Issued December 15, 1986)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

These two dockets concern a dispute between Gulf States Utilities Company (Gulf States) and subsidiaries of The Southern Company-Southern Company Services, Inc. (SCSI), Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (collectively referred to as the Southern Companies).

Background

The dispute concerns two agreements, a unit power sales agreement for the sale of capacity and energy by the Southern Companies to Gulf States for the period 1984-1992 (UPS agreement) and an interchange contract between the parties providing for the interconnection of their electrical systems.

The UPS agreement, as originally executed in February 1982, provided for the sale of 500 MW/year. Section 2.2.1 of the agreement states:

> In the event either party desires to increase or decrease capacity sales or purchases for the years set forth above, the parties agree to negotiate in good faith and with diligence to proceed to evaluate alternatives which may reasonably provide for such desired change in capacity; provided, that no such change shall be made except upon mutual written agreement of the parties hereto.

In May 1982, the parties agreed to increase the amount of capacity purchased under the agreement to 1,000 MW/year. The UPS agreement, as amended, and the interchange contract were then filed with the Commission in Docket No. ER82-579-000.[1]

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[1] By order issued on January 21, 1983, the Commission accepted the agreements for filing and set them for hearing as to their justness and reasonableness. 22 FERC ¶ 61,047. A settlement of the proceeding was approved by the Commission on March 23, 1984. *See* 26 FERC ¶ 61,360.

The UPS agreement was, in the course of settlement of the Commission proceeding, amended a second time to reduce the capacity purchased under the agreement to 400 MW, 500 MW, and 600 MW, respectively, for the years 1985, 1986, and 1987, and 700 MW thereafter through 1992. The effect of the reduction in capacity, together with other changes, was to reduce Gulf States' payments by approximately $354 million over the term of the agreement. In addition, the parties added section 2.2.4 to the UPS agreement to provide for increases (but no decreases) in the amount of power to be sold beginning January 1, 1987, and continuing each January 1, thereafter. The parties also amended the interchange contract by adding a new rate schedule, Service Schedule E. Schedule E provides for long term power sales to Gulf States in amounts ranging between 300 MW and 650 MW through May 31, 1992, provided that such power is not needed to meet the Southern Companies' load or certain sales to third parties. In January 1986, Gulf States commenced efforts to renegotiate the UPS agreement, in order to decrease the amount of capacity to be purchased. On July 2, 1986, Gulf States filed a suit against the Southern Companies in Federal district court,[2] alleging that they have failed to engage in good faith modifications to their agreements, and that this constitutes breach of contract, the torts of bad faith dealing and fraud, and a violation of the Texas Deceptive Practices-Consumers Protection Act.[3] Further, Gulf States' suit alleges that the company is discharged from its obligations on grounds such as commercial impracticability, frustration of purpose, mistake, unconscionability, and force majeure. Finally, Gulf States contends that the Southern Companies have breached their agreements by

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[2] *Gulf States Utilities Co. v. Alabama Power Co., et al.*, No. B-86-634-CA (E.D. Tex.). The complaint was amended on August 27, 1986, and again on October 15, 1986.

[3] Texas Business & Commerce Code Annotated, §§ 17.41-17.63.

charging the former for long-term power under Schedule E when such power is, in fact, not available under the terms of that rate schedule. The company's suit in Federal court requests damages and reformation of the UPS agreement and Schedule E so as to eliminate its obligations thereunder. Pending the outcome of Gulf States' suit, the company is paying into the court amounts due under the UPS agreement and the interchange contract.

Docket No. EL86-53-000

On August 25, 1986, SCSI, on behalf of the Southern Companies, filed a petition for a declaratory order from the Commission. The petition sets forth the background information recited above and alleges that the subject matter of Gulf States' suit is within the exclusive or primary jurisdiction of this Commission. SCSI requests the Commission to declare that: (1) it possesses exclusive or primary jurisdiction over the UPS agreement and the interchange contract; (2) only this Commission may alter, amend, rescind, or otherwise modify the agreements; (3) the "filed rate" doctrine prohibits Gulf States from obtaining damages predicated on retroactive calculations involving assumed changes in the UPS agreement; (4) the Southern Companies have discharged their obligations under section 2.2.1 of the UPS agreement; (5) Section 2.2.1 does not compel the Southern Companies to change the UPS agreement absent their consent to such changes; (6) Section 2.2.1 does not relate to the interchange contract or any service schedules thereunder; and (7) this Commission is the only forum in which Gulf States may pursue these issues, pursuant to section 206 of the Federal Power Act.[4] In the alternative, SCSI requests that the Commission order Gulf States to show cause (1) why the latter is not performing in accordance with the UPS agreement and the interchange contract, and (2) why Gulf States' actions do not constitute an

[4] 16 U.S.C. § 842e (1982).

attempt to avoid and frustrate this Commission's jurisdiction over the agreements.

On November 14, 1986, SCSI filed an amendment to its petition, in response to Gulf States' October 15 amendment of the latter's complaint in Federal court. SCSI's amended petition requests an additional 23 declarations from the Commission concerning the parties' Federal court dispute. (These additional declarations are attached as Appendix "A").

Docket No. EL86-57-000

On August 28, 1986, Gulf States filed a complaint against the Southern Companies, requesting that the Commission set the UPS agreement and Schedule E of the interchange contract for hearing under section 206 of the Federal Power Act and to void or modify the agreements as necessary. In support, Gulf States alleges that unforeseeable changes have occurred since the agreements were signed, so that the capacity and energy is no longer needed. Continuation of its obligations under the current terms of the UPS agreement and Schedule E of the interchange contract would, Gulf States alleges, jeopardize the company's financial integrity.

Gulf States contends that its arrangements with the Southern Companies are unjust, unreasonable, and unduly discriminatory in several other respects as well. First, the company's demand for power is allegedly less than that forecasted at the time the agreements were executed, while the Southern Companies' demand is greater than forecasted. Gulf States argues that the Southern Companies are meeting this demand from power supplied by Gulf States. At the same time, Gulf States alleges, the Southern Companies are selling more expensive capacity to Gulf States which it does not need and which would not be available under the terms of the parties' agreements were it not for the Southern Companies' purchase of cheaper power from Gulf States. In

effect, Gulf States contends, the Southern Companies are buying power from the former and then selling it back to the company at higher prices. A just and reasonable relationship would, Gulf States asserts, result in the Southern Companies' paying capacity charges to Gulf States rather than vice versa.

Second, Gulf States contends that because it is forced to purchase power from the Southern Companies at a rate greater than the cost of power produced from its own generating capacity, the current arrangement is wasteful and inequitable to its customers. Third, Gulf States argues, the arrangements unfairly place the burden of carrying the Southern Companies' generating reserves on Gulf States and its customers. Fourth, the UPS agreement allegedly requires Gulf States to purchase power from the Southern Companies' newest, most expensive units at a rate exceeding the Southern Companies' system average cost. This, Gulf States contends, results in its subsidizing the Southern Companies' corporate obligations. Fifth, Gulf States contends that the UPS agreement is unjust and unreasonable in that, while it permits the Southern Companies not to deliver power 10 percent of the time, Gulf States must pay a rate which exceeds the rates charged by the former for full requirements wholesale power which is available at all times and backed up with reserve capacity. Finally, Gulf States contends that its agreements with the Southern Companies undermines national energy, economic, and environmental policies.

On September 18, 1986, Gulf States filed a motion for expedited consideration of its complaint. In support, the company reiterates that its financial situation is precarious due, in part, to the company's inability to recover the full cost of the power purchased from the Southern Companies in its retail rates. Gulf States therefore requests that the Commission appoint a presiding judge at the earliest date and direct him to conclude hearings and

certify the record to the Commission within forty-five days.

Notice of the Filings and Responses

Notice of SCSI's petition in Docket No. EL86-53-000 was published in the *Federal Register*,[5] with comments due on or before September 18, 1986. Timely motions to intervene in support of the petition were filed by Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company. Sam Rayburn Generation and Transmission Cooperative, Inc. (SRG&T) and Oglethorpe Power Corporation (Oglethorpe) also filed timely motions to intervene. Untimely motions to intervene were filed by the Louisiana Public Service Commission (Louisiana Commission) and the Towns of Erath, Gueydan, and Kaplan, Louisiana (Towns). SRG&T, Oglethorpe, the Louisiana Commission, and the Towns do not raise any specific issues in their motions.

A timely motion to intervene was also filed by Gulf States. The company requests that the Southern Companies' petition be denied. In support, Gulf States contends that the Commission's authority over the UPS agreement and interchange contract does not extend to the state law claims currently pending in Federal district court, and that the Federal district court's jurisdiction is primary, if not exclusive.

Gulf States further argues that the Commission should, for several reasons, decline to construe certain provisions in the Gulf States-Southern Companies agreements and determine whether the Southern Companies have abided by them. First, according to Gulf States, construction of the disputed contract terms does not require technical expertise within the province of the Commission. Second, no need for uniformity of interpretation exists since the terms are "relatively unique" to the disputed agreements.

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[5] 51 Fed. Reg. 32,242 (1986).

Third, resolution of the matters by the Federal district court would not undermine this Commission's regulatory responsibilities, since resolution of the disputed contractual provisions allegedly rests upon the conduct and intentions of the parties. Finally, resolution of the contract dispute by the Commission would duplicate the Federal court proceedings and undermine the company's already precarious financial position. With respect to the allegation that the "filed rate" doctrine bars an award of damages based upon retroactive calculations and assumptions, Gulf States argues that a Commission ruling on the point is premature, since the Federal court has not made any such award. Finally, Gulf States contends that the Commission should not consider whether the company is violating its agreements by depositing monies due the Southern Companies into the court pending resolution of their dispute.

In the event that the Commission initiates proceedings as to the issues raised by the Southern Companies' petition, Gulf States requests that the Commission consolidate Docket Nos. EL86-53-000 and EL86-57-000, order the proceedings to be expedited, and state clearly that it is not interfering with the Federal court proceedings addressing the company's state law claims.

On October 3, 1986, SCSI filed a response to Gulf States' motion to intervene in Docket No. EL86-53-000. While not opposing Gulf States' intervention or its request to consolidate Docket Nos. EL86-53-000 and EL86-57-000, SCSI states that it is clear, based upon Gulf States' actions and statements contained in its pleadings, that the Commission possesses jurisdiction over the parties' dispute and should exercise it.

Notice of Gulf States' complaint in Docket No. EL86-57-000 was published in the *Federal Register*,[6] with comments due on or before September 30, 1986. Timely no-

[6] 51 Fed. Reg. 32,241 (1986).

tices of intervention or motions to intervene were filed by the Louisiana Commission, the Towns, SRG&T, and Brazos Electric Power Cooperative, Inc. (Brazos). In addition, an untimely motion to intervene was filed by the Gulf States Energy Users Group (GSEUG). No specific issues are raised in the intervenors' pleadings.[7]

On September 30, 1986, the Southern Companies filed an answer to Gulf States' complaint. The Southern Companies dispute many of the statements and allegations contained in the complaint. They deny that unforeseen circumstances have arisen. On the contrary, they contend that the "unforeseen circumstances" were in fact the reasons for which the agreements were amended in the course of the proceedings in Docket No. ER82-579-000. The Southern Companies deny that they are obligated to amend the UPS agreement simply because Gulf States so desires. As to Gulf States' claim under section 206, the Southern Companies argue that whether the agreements at issue have become uneconomic from the former's perspective is

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[7] The Public Utility Commission of Texas (Texas Commission) filed, on September 29, 1986, a notice of intervention in Docket No. EL86-57-000 and comments, on October 6th, in support of an evidentiary hearing. On October 24th, the Texas Commission moved to withdraw its intervention. Gulf States opposes the withdrawal, alleging that: (1) the Texas Commission has failed to demonstrate good cause; and (2) the state commission's participation is in the public interest. Gulf States contends that the Texas Commission's disallowance, at retail, of recovery of the full costs of the power purchased from the Southern Companies has affected the utility's ability to perform under the contracts, and that, in the circumstances, the State commission should not isolate itself from these proceedings.

We shall, notwithstanding Gulf States' opposition, permit the Texas Commission to withdraw as an intervenor in Docket No. EL86-57-000. The state commission is not a necessary party to the proceedings. Further, the respective jurisdictions of this Commission and the state commission are not altered by the latter's participation, or failure to participate, in these proceedings. Finally, as a matter of comity, we believe that the Texas Commission's desire not to participate should be respected.

irrelevant to a determination as to their justness and reasonableness, citing *Southern Company Services, Inc.*, 26 FERC ¶ 61,360 (1984) and *Pennsylvania Power & Light Co.*, 23 FERC ¶ 61,325 (1983). The only cognizable allegations, the Southern Companies argue, are those relating to the reasonableness of the rates.[8] The Southern Companies further deny that the provisions of the UPS agreement and Schedule E are unjust, unreasonable, unduly discriminatory or preferential.

The Southern Companies do not oppose Gulf States' request for an evidentiary hearing, but they do object to the request for expedited consideration of the complaint. The Southern Companies contend that such treatment would not provide the parties with adequate time to conduct the proceedings and explore the issues raised in these dockets. They also oppose waiver of an initial decision.

Discussion

Although SCSI, in filing its petition for a declaratory order in Docket No. EL86-53-000, states that it is doing so as agent for the four operating utilities of The Southern Company system, we shall state, in order to avoid any uncertainty, that the timely, unopposed motions to intervene filed by Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company serve to make them parties to that docket. The timely, unopposed motions to intervene filed by Gulf States, Oglethorpe, and SRG&T serve to make them parties to Docket No. EL86-53-000 as well. The Southern Companies, as respondents named in Gulf States' complaint, are automatically parties to Docket No. EL86-57-

[8] The Southern Companies specifically mention Gulf States' claims regarding: (a) nonexistent capacity (Complaint at 21-24); (b) challenges to the pricing formula and the units involved in the sale (*Id.* at 27-28); and (c) the claim that the Southern Companies are obligated to agree upon a reduction in Gulf States' capacity purchases (*Id.* at 11, 14-15, 21).

000.[9] The timely, unopposed notices and motions to intervene serve to make the Louisiana Commission, the Towns, SRG&T, and Brazos parties to Docket No. EL86-57-000. Finally, given the interests of the constituencies which they represent, the early stage of this proceeding, and the apparent absence of any undue prejudice or delay, we find that good cause exists to grant the untimely motions to intervene of the Louisiana Commission and the Towns in Docket No. EL86-53-000 and of GSEUG in Docket No. EL86-57-000.

Gulf States' Complaint

Based upon the pleadings, we believe that an evidentiary hearing is warranted with respect to the justness and reasonableness of the UPS agreement and Schedule E of the interchange contract, and we shall therefore set those agreements for investigation pursuant to section 206 of the Federal Power Act. As noted, the Southern Companies contend that the economics of Gulf States' purchase is irrelevant to the Commission's inquiry. We disagree. The gravamen of Gulf States' position is that, in light of changed circumstances, the terms of the UPS agreement and Schedule E, including the quantity of power to be purchased, should be reformed. We believe that Gulf States' arguments regarding the economics of its purchase obligations may be relevant in light of the existence of section 2.2.1 of the UPS agreement. Because we shall undertake to construe that provision at the request of the Southern Companies, we are not prepared at this time to limit the inquiry in the manner suggested by them.

Gulf States requests that the record be certified to the Commission for its review within forty-five days. We believe, however, that in light of the complexity of the issues set for hearing, certification of the record within

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[9] *See* 18 C.F.R. § 385.102(f)(2) (1986).

forty-five days would provide insufficient time to properly air and resolve the issues. Furthermore, we believe that the issuance of an initial decision by the presiding judge will assist the Commission in its review of the case. However, the Commission appreciates the reasons for which Gulf States requests expedited consideration. We shall therefore direct the presiding judge to issue an initial decision and certify the record to us within 120 days of the date of this order.

SCSI's Petition For A Declaratory Order

As noted, SCSI filed a petition for a declaratory order prior to the submission of Gulf States' complaint in Docket No. EL86-57-000 regarding various issues arising out of Gulf States' suit in Federal district court. These issues concern matters of Commission jurisdiction, the availability of certain forms of relief from the court and the Commission, and interpretation of the agreements between Gulf States and the Southern Companies.

The complaint filed by Gulf States against the Southern Companies in Federal court consists of fifteen counts. The first four counts allege, in essence, that the Southern Companies have, in failing to negotiate further changes to the UPS agreement and Schedule E, not acted in good faith. The fifth count of the complaint pending in Federal court alleges that the Southern Companies are selling capacity to Gulf States which, in fact, is not available to the latter within the terms of the parties' agreements. The sixth through fifteenth counts set forth various other grounds for which Gulf States seeks to be excused from its contractual obligations.

This Commission possesses exclusive jurisdiction over wholesale sales of electricity and the reasonableness of the rates to be charged for such service. *Nantahala Power & Light Co. v. Thornburg*, —— U.S. ——, 106 S.Ct. 2349 (1986); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982). Thus, to the extent the parties' suit in

Federal district court involves a determination as to the justness and reasonableness of their agreements, only this Commission may adjudicate the matter.

With respect to breach of contract claims arising under state law, the Commission does not possess exclusive jurisdiction. *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961). Nonetheless, certain issues presented by state law claims may lie within the primary jurisdiction of this Commission, such as where a dispute involves construction of a contract or tariff subject to our jurisdiction. *See, e.g., United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956); *AEP Generating Co.*, 32 FERC ¶ 61,364 (1985), *reh'g granted on other grounds*, 36 FERC ¶ 61,222 (1986).

The question of whether the Commission should exercise primary jurisdiction is one within our discretion. As the Court noted in *Western Pacific Railroad Co., supra*, no fixed formula exists for applying the doctrine of primary jurisdiction. Rather, the proper inquiry is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. 352 U.S. at 64. Among the factors which bear on the inquiry are: the nature and pervasiveness of the regulatory scheme; whether agency adjudication of the parties' dispute will be a material aid in ultimately deciding the issue; the nature of the relief sought; whether the issues raised are technically complex; and whether there is a need for uniformity of interpretation. *See Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976).

Gulf States' suit in Federal district court raises questions as to the meaning of various provisions in the parties' agreements, particularly section 2.2.1 of the UPS agreement and Service Schedule E of the interchange contract. Interpretation by the Commission in the first

instance as to the meaning of the terms of contracts and rate schedules on file with the Commission is, we believe, necessary in order to preserve the integrity of our regulation over public utilities. Further, the interpretation of the relevant provisions may require this agency's technical expertise. We shall therefore assert jurisdiction over the following questions:

> 1.a. What is the meaning of section 2.2.1 of the UPS agreement, and what are the reasonable alternatives available thereunder?
>
> 1.b. Whether the Commission should require the parties to proceed under one of those alternatives?
>
> 2. Whether the Southern Companies are selling capacity and energy under the terms of the interchange contract which is not available under the terms of Service Schedule E.

In light of the fact that both parties to the agreements at issue have not fully set forth their views as to the meaning of the provisions relating to available capacity under Schedule E or modification of their agreements, we shall set these matters for hearing and decision, in the first instance, by the presiding judge as part of the section 206 proceeding concerning the Gulf States-Southern Companies agreements.

With respect to Gulf States' allegation that the Southern Companies have not acted in good faith, the question is not one which appears to implicate technical expertise, nor is it one which is central to our regulatory responsibilities. Rather, the question appears to turn primarily upon the conduct and subjective motives of the parties. We shall therefore not assert jurisdiction over that aspect of the parties' dispute in Federal district court.

In addition, we shall undertake to interpret the parties' agreements insofar as they relate to declaration numbers 9, 10, 11, 12, 14, 15, 19, 23, 24, 25, 26, 27, and 28 in the

Southern Companies' amendment to its petition. The issues raised by these declarations touch upon the reasonableness of the rates under agreements that are subject to our jurisdiction. The remainder of the declarations requested in the amendment, however, appear to raise conclusions of law or fact more appropriately resolved by the district court.

The Southern Companies also request that the Commission make certain declarations regarding the availability of relief from the Federal court *vis-a-vis* this Commission. Specifically, they ask that the Commission state that: (1) only the Commission may alter, amend, rescind, or otherwise modify the parties' agreements; and (2) the "filed rate" doctrine prohibits any attempt to recover money damages predicated on retroactive calculations involving assumed changes in the charges for or quantities of capacity and energy under the subject contracts, which calculations would further presuppose this Commission's approval of said assumed changes.

The "filed rate" doctrine prohibits a utility from charging a rate other than that on file with the Commission, and not even a court can authorize a different rate. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). The Supreme Court has held, for example, that application of the doctrine bars a court from awarding damages, for breach of contract, of an amount based upon the assumption that had a different rate been filed in the past, it would have been collected by the seller. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). The considerations underlying the doctrine are preservation of the Commission's jurisdiction over the reasonableness of rates and the need to ensure that regulated companies charge only those rates of which the agency has been made cognizant. 453 U.S. at 577-78.

The Southern Companies' petition asks the Commission, in effect, to comment upon the range of remedies available

to the Federal district court in the event it ultimately finds in favor of Gulf States. In addition, the Southern Companies contend that payment of monies due under the agreements at issue into the court depository, pursuant to Rule 67 of the Federal Rules of Civil Procedure, rather than to them violates the "filed rate" doctrine.

Beyond the statements made above, we shall decline the request to comment upon the remedies which may ultimately be imposed by the Federal district court. The Federal district court has not yet tried the case, much less found in favor of Gulf States on its claims. In the circumstances, we believe that it would be premature to comment. With respect to the payment of monies into the court depository, the Southern Companies do not allege that Gulf States is failing to pay the amounts called for by the parties' agreement; instead, they merely allege that the latter is paying these amounts to the court rather than to them pending resolution of the Federal court proceeding. In the circumstances, we do not believe that payment of monies into the Federal district court depository on account of the parties' dispute constitutes a violation of the "filed rate" doctrine.

Because there exist common questions of law and fact, we shall consolidate Docket Nos. EL86-53-001 and EL86-57-001 for purposes of hearing and decision.

The Commission orders:

(A) The motions to intervene filed by the Louisiana Commission and the Towns in Docket No. EL86-53-000 and of GSEUG in Docket No. EL86-57-000 are hereby granted, subject to the Commission's Rules of Practice and Procedure.

(B) The withdrawal of the notice of intervention filed by the Texas Commission in Docket No. EL86-57-000 is hereby accepted.

(C) The Commission hereby grants the Southern Companies' petition for a declaratory order, as amended, to the extent indicated in the body of this order.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the UPS agreement and Service Schedule E of the interchange contract between Gulf States and the Southern Companies. Further, the Commission hereby sets the questions of contract interpretation for resolution by the presiding judge, as discussed in the body of this order.

(E) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in this proceeding within approximately fifteen (15) days of the date of this order, in a hearing room of the Federal Energy Regulatory Commission, 825 North Capitol Street N.E., Washington, DC 20426. The presiding judge is hereby directed to complete the proceeding and to issue an initial decision within 120 days of the date of this order. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) Subdockets 000 of Docket Nos. EL86-53 and EL86-57 are hereby terminated. Subdocket Nos. EL86-53-001 and EL86-57-001 are assigned to the evidentiary hearing ordered herein.

(G) Docket Nos. EL86-53-001 and EL86-57-001 are hereby consolidated for purposes of hearing and decision.

Commissioner Naeve *dissented* in part with a separate statement attached.

APPENDIX "A"

9. The capacity and energy provided by Southern Companies to Gulf States under Schedule E constitutes "Long Term Power," as that term is defined in Section E1.1 of the schedule, and that Southern Companies have continuously satisfied their contractual obligation to make available to Gulf States long term power in accordance with the provisions of Schedule E; and

10. The definition of "Long Term Power" contained in Schedule E to the Interchange Contract in no way applies or relates to the UPS Agreement; and

11. Economy energy purchases by Southern Companies from Gulf States or from other utilities in no way proves or demonstrates a "need" on the part of Southern Companies for the capacity made available under Schedule E or for the capacity dedicated under the UPS Agreement; and

12. Favorable regulatory treatment of the costs associated with either the UPS Agreement or Schedule E by Gulf States' state regulatory commissions in Louisiana or Texas in no way alters or affects Gulf States' contractual obligations under those contracts; and

13. Neither the UPS Agreement nor Schedule E have been rendered "commercially impracticable" by reason of a ruling by the Public Utility Commission of Texas disallowing pass-through of the capacity charges to retail ratepayers due to a finding of imprudence on the part of Gulf States; and

14. Gulf States' contractual obligations under the UPS Agreement and Schedule E are not "excused, suspended and discharged" as a result of the PUCT's decision disallowing pass-through of the capacity charges to retail ratepayers based upon a finding of imprudence on the part of Gulf States; and

15. The PUCT's disallowance of pass-through of capacity charges to retail ratepayers based upon a finding of imprudence on the part of Gulf States does not prevent Gulf States from performing the contractual obligations owed Southern Companies under those contracts; and

16. The provisions of Section 2.615 of the Uniform Commercial Code (Section 2.615 of the Texas Business and Commerce Code, or comparable provisions of any other state's laws applicable to the transaction under an appropriate choice of law analysis) afford no basis upon which Gulf States can avoid its contractual obligations under the UPS Agreement or Schedule E to the Interchange Contract; and

17. There has been no frustration of purpose which would enable Gulf States to avoid its contractual obligations owed Southern Companies under the UPS Agreement or Schedule E to the Interchange Contract; and

18. Gulf States may not avoid its contractual obligations owed Southern Companies under the UPS Agreement and Schedule E because those contracts are, according to Gulf States, no longer economical or beneficial to Gulf States; and

19. Neither the UPS Agreement nor Schedule E to the Interchange Contract was predicated upon an assumption that the resulting expenses would receive favorable state retail regulatory treatment in Texas and Louisiana; and

20. There has been no "mutual mistake" of the parties with regard to either the UPS Agreement or Schedule E which would allow Gulf States to avoid its contractual obligations owed Southern Companies under those contracts; and

21. The fact that (in Gulf States' view) the UPS Agreement and Schedule E are not now providing the economic benefits expected by Gulf States does not render

either contract "unconscionable," nor would such constitute a "unilateral mistake" on the part of Gulf States entitling it to avoid its contractual obligations under those contracts; and

22. Neither the UPS Agreement nor Schedule E to the Interchange Contract are "unconscionable"; and

23. Favorable state regulatory treatment of expenses under the UPS Agreement and Schedule E and perpetual economic benefit to Gulf States are not conditions precedent or subsequent upon which Gulf States can avoid its contractual obligations owed Southern Companies under the contracts; and

24. Section 9.2 of the Interchange Contract (the "force majeure" provision) under no circumstances applies or relates to the UPS Agreement; and

25. The PUCT's disallowance of pass-through of capacity charges under the UPS Agreement and Schedule E based upon a finding of imprudence on the part of Gulf States does not "prevent" Gulf States from performing its obligations under the contracts; and

26. A state regulatory commission's finding of imprudence on the part of Gulf States in entering into either the UPS Agreement or Schedule E to the Interchange Contract in no way affects the enforceability of such contracts, nor does such state regulatory action provide a basis upon which Gulf States can avoid its contractual obligations; and

27. Section 7.2 of the Interchange Contract pertains to bona fide disputes involving cost data, computations and other such matters; and

28. Section 7.3 of the UPS Agreement pertains to bona fide disputes involving cost data, computations and other such matters; and

29. Neither the UPS Agreement nor Schedule E to the Interchange Contract is terminated simply because Gulf

States no longer wishes to be bound by its commitments under those contracts; and

30. Gulf States is not entitled to avoid its contractual commitments because the UPS Agreement and Schedule E, based on hindsight, changes in demand forecast and unfavorable state regulatory treatment, no longer appear economical from the standpoint of Gulf States; and

31. Southern Companies are entitled to rely on the fact that Gulf States will honor its contractual commitments to purchase capacity and related energy under the UPS Agreement and Schedule E to the Interchange Contract.

Commissioner NAEVE, dissenting in part:

I part company with my colleagues to the extent that they have elected to address the jurisdictional issues raised by the Southern Companies in their petition for declaratory order.

The exercise of primary jurisdiction is an issue committed to the discretion of the Commission. We must proceed with extreme caution when requested to assert primary jurisdiction regarding a contractual dispute. The Commission has jurisdiction over tens of thousands of contracts. If we do not exercise restraint with respect to primary jurisdiction in such cases, we will find our resources increasingly committed to refereeing parties' contractual disputes and our fundamental regulatory mission jeopardized.

In *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175 (1979), the Commission set forth the three factors to be considered in deciding whether to assert primary jurisdiction over contractual issues otherwise pending before the courts:

> (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision;

(2) whether there is a need of uniformity of interpretation of the type of question raised by the dispute; and,

(3) whether the case is important in relation to the regulatory responsibilities of the Commission.

A review of these factors in the instant contractual dispute between Gulf States and Southern Companies reveals far from a compelling case for the assertion of primary jurisdiction. First, the disputed contract terms do not appear to be especially technical. Even without our expertise in the electric power industry, a court should be able to adequately address these issues. Second, the questions raised in this proceeding appear to be unique to the Gulf States' and Southern Companies' contractual relationship. Hence a court's resolution of these questions raises no specter of the need for uniformity in interpretation. Third, and in my view most importantly, this case raises no legal or policy questions critical to our regulatory programs.

Absent a compelling case for the assertion of primary jurisdiction, I believe the Commission should protect its limited resources and decline to interject itself into contractual disputes. For that reason, I would deny Southern Companies' petition for declaratory order. If my colleagues are unwilling at this time to deny the petition, the Commission should nonetheless defer asserting primary jurisdiction in cases such as this, where the extent of the Commission's jurisdiction is under active consideration by the courts.[1]

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[1] On September 25, 1986, the U.S. District Court for the Eastern District of Texas denied Southern Companies' motion to dismiss based on the Commission's exclusive jurisdiction, but certified an order for interlocutory appeal to the U.S. Court of Appeals for the Fifth Circuit. On November 25, 1986, the Fifth Circuit agreed to hear the appeal on an expedited basis.

APPENDIX E

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. TC79-8-002, TC79-8-003,
TC79-8-004 and TC79-8-005

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

OPINION NO. 248-A; OPINION AND ORDER
DENYING REHEARING

(Issued June 16, 1986)

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Opinion No. 248, issued April 7, 1986, appears at 35 FERC ¶ 61,043.]

[Opinion No. 248-A Text]

On April 7, 1986, the Commission issued Opinion No. 248 (35 FERC ¶ 61,043) concerning the effect of tariffs and contracts on the liability of Transcontinental Gas Pipe Line Corporation (Transco) for curtailment damages and the effect of an award of damages. The Commission concluded that adherence to effective curtailment tariffs would protect Transco against claims for breach of contract and promissory estoppel, but not against claims arising out of negligence, willful misconduct or

fraud. The Commission also concluded that an award of damages would not result in an undue preference or discrimination or adversely affect the Commission's functions.

Four parties have filed timely applications for rehearing.

The Interstate Natural Gas Association of America (INGAA), United Gas Pipe Line Company (United), and Transco assert that the Commission should adopt a uniform Federal standard of prudent pipeline management applicable to curtailments during supply shortages. Transco and United further urge that the standard should not be just a common law negligence standard but should be a "good faith" standard that would require a showing of wrongful causation of shortages by a pipeline before liability could be imposed by a court for curtailment damages. Transco and United also argue that the Commission should have reviewed specific allegations of mismanagement made by CF Industries, Inc., and Farmers Chemical Association, Inc. (collectively CF-Farmers) in their curtailment damage suit against Transco that has resulted in a jury award of $23.8 million plus interest.

The foregoing assertions by Transco, United, and INGAA are new versions of arguments rejected in Opinion No. 237 [31 FERC ¶ 61,336]. No further discussion is necessary except as to the argument that the Commission should review the negligence claim by CF-Farmers that Transco added new or enlarged service at a time when it knew or should have known that it would be curtailing. Transco and United argue that any liability claim based upon new or enlarged service constitutes a collateral attack on the Commission certificates authorizing service, and specifically the findings contained in the certificates as to the adequacy of gas supply.

Opinion No. 248 indicated that CF-Farmer's claims did not involve a collateral attack because the technical

requirement of an identity of litigated issues is missing. At bottom, what Transco and United are suggesting is that, once a public convenience and necessity determination is made in an uncontested certificate proceeding, the certificate holder becomes immune forever from adverse consequences flowing from implementing the contract underlying the certificate. That result would be incompatible with the gas supply policy adopted by the FPC and continued by this Commission. CF-Farmers correctly points out that in relaxing the twelve-year deliverability standard in 1964, the FPC shifted primary reliance on pipeline management for balancing gas supply and demand. In Order No. 279, issued March 31, 1964, the FPC adopted use of Annual Report Form No. 15 in which pipeline gas reserves and deliverability would be reported on an annual basis.[1] The information provided by that form, the FPC stated, "will make it possible to relax the 12-year deliverability life requirement where the information supplied by the pipeline company indicates it has an active procurement program, its system extends into production areas with continuous exploration and the results thereof indicate continuing ability to meet gas requirements."[2] In its annual reports to Congress in 1964 through 1968 the FPC affirmed this policy of relying on pipeline management to maintain adequate reserves.[3] Without disclaiming that policy, the FPC's 1969 annual report noted declines in exploratory drillings and an accelerated decline in the reserve/production ratio in the

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[1] Total Gas Supply of Pipeline Companies—Annual Report Form, Docket No. R-239, 31 FPC 750 (1964).

[2] 31 FPC at 751

[3] *Forty-Fourth Annual Report of the FPC Fiscal Year Ended June 30, 1964*, at 110; *Forty-Fifth Annual Report of the FPC Fiscal Year Ended June 30, 1965*, at 120; *Forty-Sixth Annual Report of the FPC Fiscal Year Ended June 30, 1966*, at 125; *Forty-Seventh Annual Report of the FPC Fiscal Year Ended June 30, 1966*, at 40; *Forty-Eighth Annual Report of FPC Fiscal Year Ended June 30, 1968*, at 48.

immediately preceding years.[4] The FPC's 1970 report acknowledged the existence of a gas shortage and reported on a number of efforts dealing with the problem.[5] Although there was no mention in the 1970 report of a change from relying on pipeline management to balance sales and supplies, the Commission did indicate that conferences had been held with major pipelines concerning shortages and proposed measures, including refusal to accept large new sales loads and refusal to increase additional peak-day and peak-period sales to existing customers.[6]

The point is that during the period in question, the FPC made findings on adequacy of gas supply in Transco's new or enlarged service certificates as of the point in time that the decisions were made and, for the long-range future, had shifted reliance primarily to pipeline management. In other words, the FPC's finding of adequate gas supplies in granting the uncontested new or enlarged service certificates were based not only on the knowledge of Transco's gas deliverability at the time but also on the anticipation that intensified efforts of Transco to develop gas supplies would be successful. Thus, we must reject Transco's collateral attack argument, not only because the technical collateral estoppel requirement of an identity of litigated issues is missing but also because Transco's emphasis on the adequacy of supply findings in the certificates is misplaced.

CF-Farmers and Transco state that in distinguishing *Chicago and Northwestern Transportation Co. v. Kalo*

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[4] *Forty-Ninth Annual Report of the FPC Fiscal Year Ended June 30, 1969*, at 44-45.

[5] *Fiftieth Annual Report of the FPC Fiscal Year Ended June 30, 1970*, at 63.

[6] *Id.* at 63. After shortages had abated, this Commission indicated continued reliance on the policy in a pipeline purchase gas adjustment case. *Tennessee Gas Pipeline Company*, 21 FERC ¶ 61,004, at p. 61,006 (1982).

Brick & Tile Co., 450 U.S. 311 (1981), we incorrectly stated that CF-Farmers was not a participant in any new or enlarged certificate proceedings. Farmers Chemical Association, Inc., however, did intervene in support of one uncontested certificate application, Docket No. CP68-155, 39 FPC 663 (1968). In any event, CF-Farmers assertions do not vitiate the distinction made in the opinion that issues in the suit against Transco were not litigated in the FPC proceedings as contrasted to *Kalo Brick & Tile* where the same abandonment issue was tried before both the ICC and a court.

Transco asserts that we mischaracterized two proceedings (Docket Nos. RP77-102 and RP76-26) in which Transco believes findings were made on the merits that have been collaterally attacked in the Federal district court proceeding. Opinion No. 248 concluded that no findings on the merits had been made in either case. The proceeding in Docket No. RP77-102 was initiated by the filing of a petition for declaratory order. The Commission's decision in Docket No. RP77-102 at one point suggests that the Commission had rejected, as contrary to the public interest, the primary request in the petition that Transco be required to purchase emergency gas sufficient to protect all base period priority 1 and 2 requirements.[7] However, after discussion of an alternative request, the decision denied all relief requested and terminated the entire docket stating that the Commission refused to "either rule definitively on or set for hearing Transco's emergency gas allocation and pricing policy" because of an on-going general review of the subject of emergency gas purchases.[8] Thus, Transco is incorrect in asserting that there was a ruling on the merits of Transco's emergency gas purchase policies at that time in that decision.

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[7] *Public Service Company of North Carolina, et al. v. Transcontinental Gas Pipe Line Corporation*, 2 FERC ¶ 61,239, at p. 61,534 (1978).

[8] *Id.* at p. 61,535.

Concerning the decision in Docket No. RP78-26, Transco reiterates its previous argument that CF-Farmers is seeking money damages in lieu of curtailment allocations denied by the Commission. The issues are clearly different, and no new basis has been offered for changing the conclusion that collateral estoppel does not apply.

CF-Farmers requests clarification that if there is a court finding of negligence or misfeasance by Transco in causing gas supply curtailment to CF-Farmers, nothing in the Commission's regulations, orders, tariffs or the Natural Gas Act precludes recovery of a damage award, regardless of the specific cause of action under state law which supports such an award. As indicated in Opinion No. 248, recovery of damages for breach of contract (or other contract-based cause of action, such as promissory estoppel [9]) arising out of curtailment will be prevented by a pipeline's adherence to an approved curtailment plan in administering curtailments, unless there is a showing of negligence or misfeasance in causing the shortages that result in having to resort to use of the curtailment plan.[10]

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[9] In Opinion No. 248, we indicated that promissory estoppel involves a gratuitous promise. CF-Farmers correctly notes that the doctrine has been expanded beyond gratuitous promises to other promises that induced detrimental reliance. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 Yale L.J. 343, 343-44, 352 n.37 (1969); Farnsworth, *Contracts*, 92-98. Our conclusion remains that promissory estoppel is more related to contract than to fraud and that both types of claims are similarly affected by adherence to effective curtailment tariffs. It should also be noted that the second paragraph of Opinion No. 248 should have indicated that the initial decision was modified not only concerning conclusions reached on negligence claims but also on promissory estoppel claims.

[10] This conclusion is consistent with various authorities' statements of the rule of supervening prohibition or prevention by law in the law of contracts. *See, e.g., Restatement of Contracts* § 458 (1932); 6 *Corbinon Contracts* § 1346 at 432 (1951); 18 *Williston on Contracts* § 1939 at 50-51 (Jaeger 3d ed. 1978). *See also, L.N. Jackson & Co. v. Royal Norwegian Government*, 177 F.2d 694, 699 (2nd

The Commission orders:

Except as discussed above, the requests for rehearing are denied.

Cir. 1949), cert. denied 339 U.S. 914 (1950) (breach of contract to ship copra excused by Government administrative order to carry wool because of World War II requirements); *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F.Supp. 1329, 1357 (D.C. 1985) (liability for breach of contract to deliver gas based on negligence).

APPENDIX F

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. TC79-8-000

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

OPINION NO. 248; OPINION AND ORDER MODIFYING INITIAL DECISION

(Issued April 7, 1986)

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Initial Decision of the presiding administrative law judge, issued November 8, 1982, appears at 21 FERC ¶ 63,032.]

Appearances

Christopher T. Boland, Thomas F. Brosnan, John F. Harrington, Brian E. O'Neill, Thomas F. Ryan, Jr., Alfred S. Ebert, Jr. and *William A. Williams* for Transcontinental Gas Pipe Line Corporation.

Stephen A. Herman, Nolan E. Clark, Thomas W. Queen, Robert K. Scott and *A. E. Coscino* for CF Industries, Inc. and Farmers Chemical Association, Inc.

Peter J. Levin and *W. DeVier Pierson* for United Gas Pipe Line Company

Lawrence V. Robertson, Jr. for the Interstate Natural Gas Association of America

Morton L. Simons for the North Carolina Utilities Commission

Mitchel W. Hall, Joseph F. Stevens and *William R. Coleman* for Brooklyn Union Gas Company

[Opinion No. 248 Text]

Transcontinental Gas Pipe Line Corporation (Transco) filed a petition for a declaratory order on February 28, 1979, seeking rulings on its conduct and interpretations of its curtailment tariff provisions. Those provisions were designed to protect against suits for breach of contract arising out of system-wide curtailment of contractually required deliveries. Such curtailments had commenced in 1971. Subsequently, a Federal district court jury awarded damages in the amount of $23.8 million against Transco in favor of CF Industries, Inc., and Farmers Chemical Association, Inc. (hereinafter jointly referred to as CF-Farmers).

Before us is an initial decision on the issues set for hearing as a result of Transco's petition.[1] We find it necessary to modify the initial decision concerning the conclusion that courts should refer negligence questions in curtailment damage suits to the Commission. The decision is otherwise affirmed.

I. Background

By 1970, it became apparent to the Federal Power Commission (FPC) that natural gas supplies available to the interstate pipelines were becoming insufficient to meet demand. On April 15, 1971, the FPC issued Order No. 431 directing all jurisdictional pipelines to advise whether

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[1] *Transcontinental Gas Pipe Line Corporation*, 21 FERC ¶ 63,032 (1982).

curtailment of deliveries would be necessary.[2] Those pipelines anticipating curtailments were directed to file tariff sheets containing curtailment plans.

Transco filed a curtailment plan in response to the order. The plan was approved by the Commission and implementing tariff sheets were accepted for filing. Subsequently, Transco has implemented curtailments in accordance with a number of plans similarly approved by the Commission or imposed by a reviewing court.

In 1971, Transco began curtailing deliveries. One of the customers curtailed was an intra-state pipeline, North Carolina Natural Gas Corporation (NCNG). A fertilizer manufacturing facility located at Tunis, North Carolina, operated by CF-Farmers, was a customer of NCNG and was adversely affected by Transco's curtailments of NCNG.

Except for approximately two weeks during the winter of 1976, the CF-Farmers facility received feedstock and process gas requirements until October 1976 when the Commission issued Opinion Nos. 778 and 778-A. Those Opinions established a curtailment plan which allocated gas based upon the nature of the end uses of gas served by the Transco system during the fixed, pre-curtailment base period May 1, 1972 to April 30, 1973.[3]

On November 1, 1977, Transco's gas supply became insufficient to satisfy all Priority 2 requirements, which included the Tunis plant's process and feedstock requirements. The plant was closed and remained closed until July 1, 1978. Emergency gas was available. CF-Farmers, however, chose not to purchase any.[4]

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[2] Order Promulgating Statement of General Policy, 45 FPC 570 (1971).

[3] *Transcontinental Gas Pipe Line Corp.*, 56 FPC 2134 (1976) and 56 FPC 3470 (1976).

[4] Tr. 374.

CF-Farmers brought a Federal district court suit in North Carolina against Transco in May of 1977 claiming $29.7 million in compensatory damages and $100 million in punitive damages. The legal theory of the suit was that CF-Farmers was a third party beneficiary of the Transco-NCNG service agreement and that Transco had breached that agreement by curtailing deliveries to NCNG. The plaintiff also alleged that Transco was liable under North Carolina common law for negligent performance of contract, promissory estoppel, fraud, and violation of a state anti-trust and consumer protection statute.

A jury judgment of $23.8 million plus prejudgment interest of $1.9 million was entered against Transco for breach of contract, promissory estoppel and negligent performance of contract. No punitive damages were awarded. The jury found no fraud. The judge, however, granted a new trial on the fraud issue in the event the court of appeals orders a retrial.

In response to Transco's February 28, 1979 petition, the Commission instituted the present proceeding by order issued August 17, 1979. In January 1980, the United States Court of Appeals for the Fourth Circuit to which the district court judgment was appealed, stayed the appeal pending a decision on certain issues that the court referred to the Commission.[5]

II. The Issues

The issues raised by Transco's petition and the court referral were pared down to those issues which are framed in the orders of August 17, 1979,[6] and November 19, 1980:[7]

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[5] *CF-Industries, Inc. v. Transcontinental Gas Pipe Line Corporation*, 614 F.2d 33 (4th Cir. 1980).

[6] *Transcontinental Gas Pipe Line Corporation*, 8 FERC ¶ 61,186 (1979).

[7] *Transcontinental Gas Pipe Line Corporation*, 13 FERC ¶ 61,147 (1980).

(1) The effect of Transco's gas tariff curtailment provisions and service agreements and of the Commission's orders, rules and regulations on its responsibilities to its customers, including whether Transco's compliance with its curtailment tariff constitutes a defense to breach of contract claims.

(2) The meaning and effect of Transco's contract with North Carolina Natural Gas (NCNG) and the related certificate of public convenience and necessity authorizing service by Transco to NCNG and other distributors.

(3) Whether an undue preference or advantage has been or would be granted to any person, or whether any person would be subjected to undue prejudice or disadvantage in connection with the award of damages for Transco's curtailments; and, if so, what remedies would be necessary.

(4) The effect of an award of curtailment damages against Transco upon the Commission's ability to carry out its responsibilities under the Natural Gas Act.

(5) Whether Transco's curtailment tariff provisions were in technical compliance with Commission rules and regulations.

The Commission specifically declined to make determinations on the following matters:

(1) The facts and circumstances that resulted in Transco's shortages.

(2) The reasonableness and prudence of Transco's actions or any questions of negligence or wrongful conduct or involving ultimate contract liability premised upon negligence or wrongful conduct.

III. The Initial Decision

Transco and two intervenors, United Gas Pipe Line Company (United) and the Interstate Natural Gas Association of America, urge adoption of a uniform Federal

standard of prudence that would relieve liability for curtailment damages unless the supply deficiency was caused by willful misconduct or bad faith in management. The judge, however, correctly concluded that the proposed standard would usurp a portion of the jurisdiction of the courts to adjudicate liability. He also found the proposed standard too narrow in that it would exclude liability if a pipeline negligently created the need to curtail, which the courts have concluded would be a basis for liability.[8] He further concluded that the proposed standard would have no effect on potential liability under theories of promisory estoppel or fraud, which depend on alleged representations and promises made by Transco.

The judge concluded that Transco may be relieved of liability for breach of contract by the Commission's curtailment orders and Transco's curtailment tariff provisions. He added that, to the extent that a judgment against Transco is based on a breach of contract, "it would also violate Section 4(b) of the NGA by giving an undue preference or advantage to CFI and Farmers Chemical, while subjecting other direct or indirect customers of Transco to an undue prejudice or disadvantage."[9]

The judge concluded that CF-Farmers' complaint, by claiming that Transco was negligent in failing to increase its gas supply and in adding new service requirements immediately before commencement of curtailments, constituted a collateral attack on certificates of public convenience and necessity and other orders. The question of whether Transco should have undertaken certain acts to increase its gas supply, the judge believed, is one which should have been referred by the court to the Commission. Furthermore, this new and enlarged service question, he

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[8] 21 FERC at p. 65,176, citing *Monsanto Co. v. F.P.C.*, 463 F. 2d 798, 808 (D.C. Cir. 1972) and *International Paper Co. F.P.C.*, 476 F. 2d 121, 126 (5th Cir. 1973).

[9] 21 FERC at p. 65,177.

asserted, should not have been permitted to go to the jury. Because two of five grounds supporting negligence should either have been considered first or only by the Commission, he concluded the judgment also violates section 4(b) of the NGA to the extent it rests on a finding of negligence.

The judge found that damage claims for relief based on promissory estoppel and fraud do not require initial referral to the Commission and do not violate section 4(b) of the Act.

He decided that the $24 million plus interest award would not materially affect the quality or cost of Transco's service.

IV. Exceptions to the Initial Decision

Briefs on exceptions were filed by Transco, United, Public Service Electric and Gas Company (PSE&G), North Carolina Utilities Commission (NCUC), CF-Farmers and Commission staff.

Transco and United principally object that the judge erred in failing to find that their proposed uniform Federal standard of prudent management should be applied by the Commission to the breach of contract and negligence claims and a determination made as to whether Transco mismanaged its gas supplies.

Transco also takes exception to the initial decision for not finding that Federal law has pre-empted CF-Farmers' common law claims based on promissory estoppel and some aspects of their fraud claims. Transco maintains that the claims are in conflict with the NGA and Commission orders. Transco also argues that the initial decision erred in finding that CF-Farmers' damage award, if upheld, would not materially affect Transco or the service it renders.

CF-Farmers, NCUC, PSE&G, and staff take exception to the finding that Transco's general curtailment tariff relieves Transco of damage liability for failure to deliver promised volumes of gas. CF-Farmers, NCUC and staff present essentially the following additional exceptions:

(1) The judge erred in finding that the district court judgment, to the extent it is based on negligence claims, would violate section 4(b) of the NGA by giving an undue preference or advantage to CF-Farmers and imposing an undue prejudice or disadvantage on other customers;

(2) The judge erred in holding that claims based on Transco's negligence should have been considered by the Commission;

(3) The judge erred in holding that the district court judgment involved a collateral attack on Commission orders.

CF-Farmers except to the initial decision to the extent that it can be read to suggest that enforcement of the district court judgment would impair the Commission's ability to carry out its responsibilities under the NGA.[10]

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[10] Transco's statement of exceptions also includes the assertions (1) that the scope of the proceeding was improperly restricted by the orders of August 17, 1979, and November 19, 1980, and (2) that the presiding judge erred in striking evidence of the nature of the damages sought by CF-Farmers and failed to analyze the effect of an award of damages on the Commission's ability to carry out its responsibilities under the NGA. No extended discussion of these exceptions is necessary. Transco offered no argument supporting either assertion. Furthermore, appeals from the judge's evidentiary rulings were discussed in detail in the order of November 19, 1980 (13 FERC at pp. 61,300-61,302). We find no basis for reconsidering the conclusions reached in the order. We have considered the effect on the Commission's functions of the CF-Farmers judgment against Transco in this opinion at Part VII, *infra*.

V. Discussion

A. Uniform Federal Standard of Prudence

Transco and United maintain, in essence, that many of the grounds underlying CF-Farmers' claims are pre-empted by Federal law because they are in conflict with the scheme of regulation imposed by the NGA. Basically, Transco believes that the promissory estoppel and breach of contract claim are entirely pre-empted. Regarding negligence and fraud claims, which Transco concedes are not entirely pre-empted, Transco asserts that a uniform Federal standard must be applied to produce uniform court decisions on liability for curtailment.

Transco and United believe that most of the claims (without differentiating whether they are contract or negligence claims) are subject to pre-emption by Federal law. The remainder of the issues appear to them to be subsidiary. Transco, CF-Farmers, and staff all agree that criteria for deciding whether or not state law is preempted by Federal law is set forth in *Pennzoil Company v. Federal Energy Regulatory Commission*, 645 Fed. 2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). They cite three criteria under *Pennzoil* for Federal pre-emption: (1) the need for uniformity of result; (2) the Federal interest in the regulated subject matter; and (3) the comprehensiveness of the regulation.[11] These three criteria form a useful framework for analyzing the arguments for recognizing a uniform Federal standard of prudence.

Transco asserts that Federal premption is required by a need for uniformity of result because the service by Transco to NCNG under an FPC certificate (and the resulting service to CF-Farmers) has, in essence, become a Federal public utility obligation. Transco argues that "service rendered by a Federaly related entity is imbued with a federal obligation and claims for damages

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[11] 645 F. 2d at 385.

as a result of the alleged inadequacy of that service are governed by that uniform Federal standard, not state law." [12] Transco cites *Ivy Broadcasting Company v. American Telephone Telegraph Company*, 391 F. 2d 486 (2d Cir. 1968), and *North American Phillips Corporation v. Emery Air Freight Corporation*, 579 F. 2d 229 (2d Cir. 1978), in support of this proposition.

Ivy and *North American Phillips*, however, are not helpful to a resolution of the present case. In *Ivy*, the Ivy Broadcasting Company obtained damages against the American Telephone and Telegraph Company for negligence and breach of contract for failing to transmit properly numerous broadcasts of political and sports events. *North American Phillips* involves a claim for the value of a shipment of electric shavers that was highjacked in route to its destination. In both cases, the courts determined that Federal law governed damage liability. As pointed out by both CF-Farmers and staff, however, the two cases are distinguishable from the instant proceeding. As indicated below, the cases are distinguishable not only on the basis of a different need for uniformity, but also because of the difference in comprehensiveness of regulation contemplated by Congress in enacting different statutes.

In *City of New Orleans v. United Gas Pipe Line Company*, 390 F. Supp. 861 (E.D. La. 1974), United attempted to make virtually the same pre-emption argument to the Federal District Court for the Eastern District of Louisiana as Transco is now presenting to us. The district court rejected United's preemption theory. In doing so, the court specifically addressed the *Ivy* case, which had been cited to it by United. The court found that Congress had intended the Federal Communications Act to be much broader in scope than the NGA. For example, the Federal Communications Act specifically permits

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[12] Transco Br. on Exceptions at 25.

a suit for damages to be brought by anyone injured by a violation of that Act. The NGA contains no correlative provision. The court also cited decisions holding that incidences of the relationship between buyer and seller of communication services are governed by Federal law and that the Federal legislation had pre-empted the field [13], the opposite is true under the NGA, which established a state-Federal scheme of regulation.[14]

This reasoning also was adopted by the Fifth Circuit in the *Pennzoil* decision. In *Pennzoil*, the court held that the NGA and the Natural Gas Policy Act (NGPA) do not pre-empt contract claims concerning natural gas purchase contracts. The court distinguished *Ivy* relying on the *City of New Orleans* decision:

> That a contract is subject to Federal regulation does not by itself demonstrate that Congress intended Federal rather than state law govern all aspects of its performance; if the Federal interest is sufficiently served by the agency's express regulatory power, it requires some other indication of congressional policy that the contracts should be ruled by uniform Federal principles. *Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486, 490 (2d Cir. 1968). The Federal scheme of regulation under the NGA and the NGPA is limited in its displacement of state regulatory authority. Unlike the Federal Communications Act, in which *Ivy* found Federal common law governed con-

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[13] 390 F .Supp. at 866.

[14] *Id.* at 865 citing *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961); *F.P.C. v. East Ohio Gas Co.*, 338 U.S. 464 (1950); *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507 (1947); *Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682 (1947). Note, however, that the NGA does pre-empt some areas, *e.g.*, regulation of wholesale sales by pipelines. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498 (1942).

> tractual disputes involving interstate telephone service, the NGA and NGPA are not so pervasive a scheme of Federal regulation as to indicate a congressional objective that cannot be obtained without the application of Federal common law. *City of New Orleans v. United Gas Pipe Line Co.*, 390 F. Supp. 861, 865-66 (E.D. La. 1974).[15]

North American Phillips is similarly distinguishable. In that case, the court found pre-emption of state negligence law and rejected the shipper's claim, because the claim failed to satisfy requirements in the carrier's tariffs filed with the Civil Aeronautics Board. The legislative history of the Federal Aviation Act of 1958 indicates Congressional intent for comprehensive coverage by Federal law of the interstate shipment of freight. As a result, the court held that tariffs filed by the carrier under the Federal Aviation Act of 1958 completely controlled the procedures and the substance of the law for recovery of lost or damaged freight:

> Congress has created a broad, comprehensive scheme covering the interstate shipment of freight, aimed at preventing preferential treatment among shippers and establishing national equality of rates and services. This has occupied the field to the exclusion of state law . . . The allegations of appellant's complaint show that its claim is based upon the loss of goods during interstate transportation by appellee as a common carrier for hire. From the substance of these allegations, it is clear that the complaint sets forth a claim arising under Federal law.[16]

Based on the reasoning in *Pennzoil* and *City of New Orleans*, we conclude that neither *Ivy* nor *North Amer-*

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[15] 645 F.2d at 385.

[16] 579 F.2d at 233-234 (Citations omitted).

ican Phillips should have any bearing on the decision in the present case.

Transco also cites the decision in *Clearfield Trust Company v. United States*, 318 U.S. 363 (1943), in support of its proposition that matters under Federal regulation are generally subjected to Federal law because of the need for uniformity. In *Clearfield*, the issue was whether Federal standards or the law of Pennsylvania should apply to collection by the United States on commercial paper which was issued by the Government and contained a forged endorsement. The Court held that disbursement of funds or payments of debts by the United States is a constitutional function or power.[17] The Court further held that a uniform Federal rule on such transactions was required or else obligations and duties of the Government would be subjected to exceptional uncertainty.[18]

The need for uniform treatment of obligations created by the United States Government to thousands of creditors is obviously much greater than in the present case, which involves obligations created by private parties affecting a much smaller universe. In addition, the present case does not involve the exercise of a constitutional function. We also note that the precedential value of the *Clearfield* decision is in doubt, since it has not been extended to other obligations of the Government.[19]

In this connection, we note the dichotomy between the treatment of claims arising out of alleged breach of contract and those arising out of alleged negligence. On the one hand, pipeline tariffs contain curtailment plans approved by the Commission in the course of exercising its regulatory responsibilities. Those plans provide for dif-

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[17] 318 U.S. at 366.

[18] *Id.* at 367.

[19] *See, e.g., Bank of America National Trust and Savings Association v. Parnell*, 352 U.S. 29 (1956).

ferent treatment of contract entitlements based upon end-use of gas or other criteria. Uniform treatment of requirements within each curtailment priority is a goal of each curtailment plan. The Commission has a strong interest in the uniform treatment of pipelines that properly observe this goal by curtailing in accordance with their curtailment tariffs as they are required to do by Federal law. On the other hand, we do not perceive a similar Federal interest in ensuring uniform treatment for claims of negligence or omissions in dealings between pipelines and their individual customers that are subject to court redress.

We find that the administrative law judge was correct in concluding that a pipeline's adherence to effective curtailment tariffs would be a defense to pure contract damage claims, but that the pipeline could nevertheless be liable for damages flowing from its role in creating the situation that resulted in curtailments. We agree with his reliance on the reasoning in *International Paper Company v. F.P.C., supra,* and the following observation of the D.C. Circuit in *Monsanto Company v. Federal Power Commission,* 463 F.2d 799, 808 (5th Cir. 1972):

> [T]he industrial user may be able to say: Given the pickle created by the pipeline company, what the FPC did was lawful and proper as to actual subsequent retaining of the limited supply of gas, but the pipeline is liable in damage because of the way it put us all in the pickle.

Our power to approve curtailment tariffs authorizing reduction in deliveries below contractual entitlements must include the power to insulate the curtailing pipeline from breach of contract liability. As we have recently indicated, "our transportation jurisdiction, which includes the power to curtail direct sales necessarily includes the power to limit the financial consequences to a pipeline to

curtail such sales in the approved manner." [20] Otherwise, pipelines in curtailment situations would be faced with having to choose between either serving customers most likely to sue, and thereby flounting obligations set forth in their curtailment tariffs, or performing acts determined by the Commission to be in the public interest at the cost of potentially disastrous financial consequences to themselves. This conclusion is supported by the concurring Opinion of Chief Judge Brown in *International Paper Company v. F.P.C., supra:*

> In the case *sub judice*, the curtailment order, if valid, constitutes an abrogation of any contractual position calling for current delivery of specified quantities. It would be unthinkable to suggest that, having curtailed in compliance with the dictates of the FPC, that the Pipeline could thereafter be held accountable for its compliance. See [*Carter v. American Telephone & Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966)]; *PepsiCo, Inc. v. FTC*, 2 Cir. 1972, 472 F.2d 179 [(1972)]. This would seriously impair the orderly administration of the regulatory scheme.[21]

What flows from the dichotomy between breach of contract and negligence is that claims that are essentially "breach of contract" in nature and arise because of curtailments initiated and conducted in accordance with effective curtailment tariffs are preempted by Federal law, which nullifies them. But claims that require a finding of "negligence" to permit recovery remain unaffected.

Transco's argument for Federal pre-emption based on the second criterion identified in *Pennzoil*, the Federal interest in the regulated matter, also suffers from the same defect of not distinguishing between types of claims. Transco argues that "there is a paramount federal inter-

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[20] *United Gas Pipe Line Company*, 31 FERC ¶ 61,336, at p. 61,772 (1985) (citation omitted).

[21] 476 F.2d at 131.

est in ensuring in the first instance that gas is allocated in a manner that best serves the public interest, and in ensuring that no customer receives an undue preference over another, whether that advantage is in the form of gas or damage for the nondelivery of gas." [22] This argument, however, as framed by Transco, is for the most part a recasting of the argument on the need for uniformity, and our response is the same.

The third *Pennzoil* criterion to be weighed in determining whether federal pre-emption is appropriate is the comprehensiveness of the regulation. The Supreme Court has held that the Commission's authority and responsibilities in the curtailment area are extensive and extend to abrogating contracts by adopting tariffs and curtailment orders effecting obligations to deliver gas.[23] But, as we have indicated above in discussing *Ivy* and *North American Phillips*, the Commission's authority is limited. It does not extend to determining questions of negligence,[24] which is Transco's and United's ultimate objective.

The analysis of the administrative law judge in rejecting the concept of a uniform Federal standard is essentially correct and consistent with the foregoing analysis, but a possible misimpression needs correction. CF-Farmers, PSE&G, NCUC and staff object that the judge failed to qualify his discussion concerning breach of contract. They seek to limit it to the case where shortages appear requiring compliance with curtailment tariffs and the shortages are not the result of negligent acts of omissions. The structure of the initial decision (with separate discussion of contract and negligence claims) suggests that the judge's discussion of breach of contract was intended to be limited in the manner the protesting partici-

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[22] Transco Br. on Exceptions at 27-28.

[23] *F.P.C. v. Louisiana Light & Power Company*, 406 U.S. 621 (1972).

[24] *State of Louisiana v. F.P.C.*, 503 F.2d 844 (5th Cir. 1974).

pants request. Thus, protection by Commission orders, regulations, and tariffs from damages based on negligence would not be consistent with the Commission's statutory responsibilities. Assuming a finding by a court of negligence or misfeasance by Transco, tariffs and the Commission's regulations and orders would not prevent the award of damages for that negligence or misfeasance.

B. Promissory Estoppel and Fraud

Transco and United argue that the judge erroneously failed to find promissory estoppel and fraud claims subject to preemption and nullifiation in the same fashion as the breach of contract claims. They assert, however, that both promissory estoppel and fraud are closely akin to breach of contract and that it would be inconsistent to treat the three types of claims differently.

Fraud involves an intentional misrepresentation of fact. 1 Williston on Contracts § 140 (Jeager 3rd ed. 1957). This was not an issue considered by the Commission when it issued certificates to Transco in 1968-1970. We affirm the judge on this matter.

Promissory estoppel, on the other hand, is more related to contract than to fraud. It involves detrimental reliance on a gratuitous promise. *Id.* We find above that formal contracts to supply gas are overridden by effective curtailment tariffs. It would be incongruous to find that claims based on a gratuitous promise are not similarly nullified.

C. Negligence Claims

In the initial decision, the judge decided that the district court judgment involved a collateral attack upon certain Commission orders and that the question of whether Transco did act appropriately or should have undertaken certain acts to supplement its gas supply was one that should have been considered first by the Commission. The

judge's view, that questions involving the propriety of Transco's actions or omissions should have gone first to the Commission, contradicts the hearing orders, discussed above, in which the Commission decided that it did not have jurisdiction to make determinations on negligence.[25]

The Judge cites the proceedings in Docket Nos. RP77-102 and RP78-26 as being prior proceedings in which the Commission had ruled on issues identical to those raised in the district court suit against Transco. We cannot agree. The proceeding in Docket No. RP77-102 involved a petition to the Commission to order Transco to purchase emergency gas because of shortages. In that proceeding, however, there was no ruling on any issues on the merits. The Commission determined that "[i]t would be inconsistent with [review of the entire emergency gas program] to at this time either rule definitively on or set for hearing Transco's emergency gas allocation and pricing practice." [26]

The proceeding in Docket No. RP78-26 is similarly distinguishable. At issue was a request for extraordinary relief from Transco's curtailments by CF-Farmers for its Tunis, North Carolina plant. Neither the question of whether Transco should have purchased additional emergency supplies or other supplies nor any other issue in the district court suit was involved in that proceeding.

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[25] 8 FERC ¶ 61,186, at p. 61,647 and p. 61,649; 13 FERC ¶ 61,146, at pp. 61,302-61,303.

[26] *Public Service Company of North Carolina, Inc., et al.*, 2 FERC ¶ 61,239, at p. 61,535 (1978). The docket was terminated without prejudice to the filing of a new petition after the Commission had reassessed its gas policy. Thus, there was no "final judgment" to be collaterally attacked. Furthermore, the central issue in the district court suit against Transco was whether Transco should have sought to acquire emergency gas. That issue is different from the principal issue in the proceeding in Docket No. PR71-102, which was whether Transco should be ordered to purchase emergency gas.

We also do not believe that the district court litigation involved a collateral attack on FPC orders issued during the period 1968 to 1970 that permitted initiation of new or enlarged service commitments. The judge suggests that, in approving the certificates, the FPC had made determinations on the adequacy of Transco's gas supply to support such new or enlarged sales. In ruling on Transco's certificate applications for new or enlarged service, the Commission necessarily considered whether or not Transco had an adequate supply of gas. This is a different issue than the one before the district court. By the time CF-Farmers went to court, it was clear that the gas supply had not, in fact, been adequate. The issue before the court, however, was whether Transco knew or should have known whether the supply would be adequate when it applied for the certificates. In other words, the issue before the court was whether Transco had been negligent. The correctness of the Commission's appraisal of the adequacy of Transco's gas supply at the time of issuance of the certificate in question is not material to the negligence issue in the district court suit.

The decisions in *Nelson, Inc. v. United*, 355 U.S. 1954 (1978), and *Chicago and Northwestern Transportation Co. v. Kalo Brick & Tile Company*, 450 U.S. 311 (1981), cited in the initial decision and in briefs on exceptions in the present case do not affect our foregoing conclusion. *Nelson* involves the scope of a permit issued by the Interstate Commerce Commission (ICC) to a trucking company. The ICC had issued a permit in 1942 without a hearing permitting the transportation of drugstore goods. In 1951, after the trucking company's incorporation, the ICC issued an identical permit to the corporation. A subsequent ICC investigation determined that the company was carrying a much broader range of goods than were specified in the permit thereby violating the Motor Carrier Act of 1935. The *Nelson* decision involves basically an interpretation of the language of the ICC permit and is not analogous to the present case.

The decision in *Kalo Brick & Tile Company* is inapplicable, not only because of the difference between the comprehensiveness of the Interstate Commerce Act and the NGA as discussed above, but also because the party involved had, in fact, participated in the proceedings in which the ICC had decided on the merits the same abandonment issue which the party subsequently attempted to relitigate in a state court. CF-Farmers, however, was not a participant in the new and enlarged service certificate proceedings, and Transco's negligence was not an issue in those cases.

In conclusion, we believe that the claims based on negligence are not subject to the primary jurisdiction of the Commission. Furthermore, the presentation of claims against Transco based on negligence allegedly causing gas supply shortages do not constitute collateral attacks on any Commission orders, nor are they barred by any Commission, regulations, orders, tariffs, or by any provisions of the Natural Gas Act.

VII. Other Issues

One issue set for hearing was whether Transco's curtailment tariffs were in technical compliance with the Commission's regulations. No participant has argued that Transco's curtailment tariffs were not in technical compliance with the Commission's regulations. Accordingly, we find no basis for concluding that the tariffs were other than in compliance.

Another issue set for hearing was whether the damage award against Transco would affect the Commission's ability to carry out its responsibilities under the NGA. Management by this agency under the NGA and the Natural Gas Policy Act of 1978 of nationwide gas shortages with the least societal cost [27] is not possible if pipelines can be

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[27] The Commission's conculsion as to the superiority of the end-use curtailment method (in the absence of the operation of free

held liable for breach of contract despite adherence to approved curtailment tariffs when they are not culpable for shortages on their own systems. As discussed *supra*, however, that is not the case here. To the extent that damage awards against Transco do result from its culpability in causing shortages, the record does not indicate (nor does any participant suggest) any appreciable impact on this agency's functions, other than possible review of the appropriate ratemaking treatment of the awards.

The Commission orders:

The decision issued on November 8, 1982, is affirmed in part and modified concerning the conclusions reached on promissory estoppel and negligence claims as discussed in this order.

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market forces) is generally expressed in Opinion No. 92, 12 FERC ¶ 61,129, at pp. 61,273-61,274, *aff'd Consolidated Edison Co. of New York v. F.E.R.C.*, 676 F.2d 763 (D.C. Cir. 1982). This conclusion is also reflected in judicial decisions. *See, e.g., State of Louisiana v. F.P.C.*, 503 F.2d 844, 855 (5th Cir. 1974); *American Smelting and Refining Co. v. F.P.C.*, 494 F.2d 925, 936 (D.C. Cir. 1974).

APPENDIX G

FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP71-29, et al. (Phase III)

UNITED GAS PIPE LINE COMPANY

ORDER AFFIRMING RULING OF PRESIDING JUDGE, GRANTING IN PART AND DENYING IN PART MOTIONS TO LODGE, DENYING MOTION FOR INITIATION OF RULEMAKING PROCEEDING, AND CLARIFYING SCOPE OF PROCEEDING

(Issued August 9, 1978)

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr. and George R. Hall.

On December 16, 1975, the Presiding Administrative Law Judge, acting pursuant to Section 1.28(a) of the Commission's Rules of Practice and Procedure, referred to the Commission [1] (1) certain questions concerning the intended scope of the hearing previously ordered by the Commission to be held in the above-captioned proceeding

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[1] This proceeding began before the former Federal Power Commission (FPC). Pursuant to the Department of Energy Organization Act, it is now before this Commission, effective as of October 1, 1977. The term "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

and (2) the Presiding Judge's rulings on the admissibility of evidence dated November 11 and December 9, 1975. On June 10, 1976, March 25, 1977, May 10, 1977, and June 22, 1977, respectively, United Gas Pipe Line Company (United) filed with the Commission four separate motions seeking to lodge with the Commission certain opinions and orders issued by the U.S. Court of Appeals for the Fifth Circuit and three Federal district courts within its jurisdiction. Relying on these decisions United requests the Commission to affirm the November 11, 1975 ruling of the Presiding Judge and to expand the scope of this hearing to include the numerous legal and factual issues referred to this Commission by the several orders of the district courts. Reversal of the Presiding Judge's evidentiary ruling is sought by a number of United's customers who are intervenors in the proceeding and by the Commission staff. United's motions to lodge and for declartory relief are likewise vigorously opposed.

The Commission finds reasonable and therefore approves the evidentiary ruling of the Presiding Judge. The motions to lodge numerous questions referred by the courts to the Commission are for the most part denied for the reason that such questions pertain primarily to the issue of United's possible contract liability to its customers for curtailment damages rather than to issues related to the establishment of United's curtailment plan. The Commission finds that the contract liability issues are beyond the scope of its jurisdiction and authority and therefore declines to include the contract liability issues and related questions as matters to be decided in this proceeding. Certain of the referred questions, however, are well within the ambit of Commission jurisdiction, and these questions are accepted for Commission consideration and disposition.

Procedural History

That part of this proceeding now designated as Phase III arose out of United's curtailment proceedings and involves United's potential liability to its customers for

breach of contract resulting from curtailment of deliveries, United's attempts to modify its tariffs for the purpose of avoiding such liability, and the extent of the Commission's jurisdiction in the matter. United states that it is a defendant in seven lawsuits brought by direct industrial customers to recover over $1 billion in curtailment damages. Pennzoil Company, United's former parent, is a codefendant in several of the suits.

On March 31, 1971 United filed a petition requesting the Commission to issue a declaratory order determining and limiting United's obligations under the substitute fuel clauses contained in its contracts with several large utility and industrial customers. Those clauses provide that when United cannot deliver the full contract quantity of gas, it must pay the difference between the cost of gas and the customers' cost of alternate fuels. On May 17, 1971, in response to Commission Order No. 431 (45 FPC 570), United proposed a new section 12.3 of its curtailment tariff purporting to absolve it from liability under the substitute fue clauses.[2] These proposals were considered by the Commission along with other curtailment issues, following hearing, in Opinion No. 606, which was issued on October 5, 1971. While Opinion No. 606 dealt primarily with the Commission's jurisdiction over the curtailment of sales to United's direct customers, the Commission also denied United's request for a declaratory order interpreting and limiting its liability under the substitute fuel clauses and refused to approve the exculpatory tariff provision, stating that (46 FPC 805):

> Implementation of the curtailment plan itself, pursuant to our procedures, would be an absolute defense

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[2] "Whenever Seller prorates its gas supply or interrupts its service in accordance with this Section 12 of its tariff so that customers of Seller do not receive the volumes of natural gas they desire up to their Maximum Daily Quantities, . . . Seller shall not be obligated to pay or credit such customers any sums with respect to substitute fuels burned by such customers during such period of proration or interruption."

> for United against all claims for specific performance, damages, or other requests for relief under these contracts affected by curtailments that may be initiated in the courts. No additional tariff language like that proposed in Section 12.3 . . . is necessary to limit liability under contracts when agencies' orders, rules, or regulations authorize actions contrary to those contracts.

In Opinion 606-A the Commission further clarified its view of the contract liability question as follows (46 FPC 1292-1293):

> In clarification, this Commission has the responsibility and the authority to protect all consumers from efforts by pipelines to grant preferences in service to particular customers or class of customers in times when gas shortage precludes fulfillment of all contracts for delivery of gas. A claim of preference in service directly, or, in the case of substitute fuel clauses, indirectly, cannot operate to deprive this Commission of authority to assure fair and equitable curtailment plans. The pipeline companies cannot be faced with the dilemma of providing non-discriminatory service as ordered by the Commission and at the same time incur liability for breach of contracts which grant discriminatory preferences, directly or indirectly. Thus, the Commission's authority to preclude undue preferences and discriminations in service operates to preempt any contract provisions inconsistent with the exercise of that authority as not being in the public interest.

Opinions 606 and 606-A were reviewed by the Court of Appeals for the Fifth Circuit in *International Paper Co. v. F.P.C.*, 476 F. 2d 121 (5th Cir. 1973) (hereinafter *International Paper*). In referring to the above-quoted language of the Commission's opinions, the Court stated (476 F. 2d 125):

> After due study, we have determined that this language is mere dicta and has no force other than to reflect a position taken by the FPC which lacks support in the record before it.

The Commission in Opinion No. 606, upon finding that it had jurisdiction over United's curtailment plan, had referred the case to the Presiding Examiner for an initial decision on the merits of United's proposed plan. The Presiding Examiner issued his initial decision on July 3, 1972. Upon review of the initial decision the Commission, on January 12, 1973, issued its Opinion No. 647 (49 FPC 179). Insofar as it is pertinent to the phase III issues, the Commission in Opinion 647 restated its view that United could not be held liable for breach of contract and that accordingly the proposed exculpatory tariff provision was unnecessary.

Shortly after Opinion No. 647 was issued the Court issued its decision in *International Paper*. The Commission responded to that decision in Opinion 647-A (49 FPC 1211). In accordance with Chief Judge Brown's concurring opinion in *International Paper* stating that while the issue of contract liability must ultimately be resolved by the Courts, the Commission nevertheless has a positive duty under the doctrine of primary jurisdiction to determine the legal and practical ramification of its orders, the Commission proceeded to consider the issues involving United's potential contract liability and the effect of the Commission's orders thereon. (49 FPC 1219-1224). The Commission concluded that in the absence of negligence, bad faith or other wrongful conduct a pipeline acting pursuant to an approved curtailment plan must be exonerated of all liability as a matter of law, citing *F.P.C. v. Louisiana & Light Co.*, 406 U.S. 621 (1972). The Commission further found that in cases involving negligence, bad faith or wrongful conduct on the part of a pipeline, the Commission has no power to adjudicate contract liability, and that such liability must be determined by the

courts. However, the Commission reaffirmed its conclusion in Opinion No. 647 that United was not guilty of any improvidence or willful misconduct. The Commission further found that the substitute fuel clauses were not unduly preferential or inconsistent with the public interest *per se*. This finding was expressly conditioned, however, upon the Commission's interpretation that under those clauses United was exposed to potential liability for a maximum of seven days. The Commission concluded that the proposed tariff section 12.3 remained unnecessary because United was not subject to any contract liability resulting from its allocation of gas in accordance with a Commission approved curtailment plan.

Opinion Nos. 647 and 647-A were reviewed in the Fifth Circuit and, once again, the Court vacated in their entirety and remanded the Commission's findings and conclusions with respect to the contract liability and related tariff issues.

The Court found that the Commission should not have attempted to determine what United's potential contract liability would be in the absence of proposed tariff section 12.3, since this was a matter to be decided by the courts; rather the Commission should have determined what the effect of section 12.3 would be, if approved, upon United's potential contract liability. The court propounded several specific questions to be considered by the Commission (503 F. 2d 867, 5th Cir. 1974):

> Can a tariff provision remove general contractual liability? If the provision would remove liability, would the unavailability of damages subject United's curtailed customers to any undue prejudice or disadvantage?

Referring to the question of whether the substitute fuel clauses themselves might constitute an undue preference in favor of the direct customers, the Court asked (503 F. 2d 868 (5th Cir. 1974)):

Would section 12.3 have prevented such an undue preference by effectively abrogating the substitute fuel clauses? If it did abrogate them, would that subject International Paper and the others to any undue prejudice or disadvantage?

Evolution of Phase III

On March 7, 1975, the Commission issued its order on remand of Opinions 647 and 647-A, in which it divided United's curtailment proceedings into two phases (53 FPC 742). The determination of an interim curtailment plan to be effective pending the Commission's decision on a permanent plan was designated as phase I, while the ongoing proceedings involving development of a permanent plan were designated as phase II. The contract liability and related issues pertaining to United's proposed exculpatory tariff provision were included in phase II. A further order was issued on April 2, 1975, in which the Commission acted upon United's resubmission of the proposed tariff section 12.3.[3] United's request for a retroactive effective date of November 14, 1971 was denied pending the outcome of the phase II hearings. The Commission also noted the objections of Mississippi Power & Light Company to the resubmission of section 12.3. MP&L argued that since the Commission is without jurisdiction over United's direct sales, or the rates at which those sales are made, it was therefore without jurisdiction to relieve United from obligations created by the direct sales contracts. The Commission ruled that this jurisdictional issue should be included among those to be decided in phase II. The next order was issued on May 2, 1975 (53 FPC 1496). In this order, issued on rehearing of the order of March 7th, the Commission granted United's request that the contract liability issues be sev-

[3] Section 12.3 was redesignated in this order as Section 12.4. However to avoid confusion the section will be referred to throughout this order as Section 12.3.

ered from phase II and that a new phase III be created for the purpose of rendering an expedited decision on these issues. Finally, on August 20, 1975 (54 FPC 796), the Commission issued an order partially granting United's request for a declaratory order enlarging the issues to be considered in phase III. United had requested the Commission to include in phase III the issue of (1) whether the payment of damages or compensation to some of its customers would create undue preferences and discriminations, (2) whether section 12.1 of United's tariff [4] precludes damage claims, (3) whether United was guilty of negligence or willful misconduct, and (4) whether the rights of United's previously intrastate customers are fixed by its curtailment tariff, and whether the payment of damages to such customers would create undue preferences and discriminations. The order of August 20 granted United's request only as to item (2). The above-described orders of March 7, April 2, May 2, and August 20, 1975, delineate the scope of phase III as it existed prior to this order.

The parties involved in the phase III hearings quickly became embroiled in controversy over the scope of the proceedings. This controversy is reflected in the pleadings and arguments of the parties in connection with the efforts of United's adversaries to strike substantial portions of United's phase III evidence on the ground such evidence is addressed to matters beyond the scope of the proceeding. On November 11, and December 9, 1975, the Presiding Judge issued orders granting in part but for most part denying the motions to strike, and on December 16, 1975, he referred his rulings to the Commission for review. These rulings are discussed at a later point in this order. In the meantime, the damage suits against

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[4] "Whenever a shortage of natural gas impairs Seller's ability to fulfill the requirements of Seller's customers, then Seller may, without liability to its customers, prorate Seller's supplies of natural gas. . ."

United were proceeding apace. One of these actions was filed against United and Pennzoil by MP&L in the U.S. District Court for the Southern District of Mississippi seeking $160 million in curtailment damages. At United's request, the District Court stayed the proceeding until this Commission had an opportunity to exercise its jurisdiction over the still pending curtailment controversies.

The District Court's stay order was reviewed and approved by the Fifth Circuit in *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976) (hereinafter *MP&L*). The court upheld the District Court's stay order but stated that the District Court should prepare an order specifying the issues upon which the Commission's opinion was being sought. On June 10, 1976, United moved to lodge the *MP&L* decision with the Commission. On April 22, 1977, the District Court issued an order in response to *MP&L* propounding a number of specific questions which were referred to the Commission for "a full and adequate determination, articulating its rationale and supporting it with relevant finding of fact . . ." On May 10, 1977, United moved to lodge the District Court's order with the Commission.[5] On June 22, 1977, United moved to lodge a similar referral order issued by the District Court for the Southern District of Mississippi in an action for curtailment damages filed against United and Pennzoil by Mississippi Power Company.

In determining the issues pending herein for decision, the Commission shall consider first those issues associated with the motions to lodge.

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[5] United had earlier, on March 25, 1977, moved to lodge a referral order issued by the District Court for the Southern District of Alabama. This referral order related to an action for curtailment damages filed against United and Pennzoil by Allied Paper, Inc. However this case was subsequently settled, and on September 27, 1977, United withdrew its March 25th motion to lodge.

Primary Jurisdiction

This Commission and the courts reviewing its orders have recognized the Commission is without jurisdiction ultimately to determine United's liability for curtailment damages. Any such liability is for the courts to determine. *International Paper, State of Louisiana, MP&L, supra.* Nevertheless, in the course of litigation associated with United's curtailment proceedings, the courts have suggested that the Commission should and in some instances might be required to consider questions involving United's possible contract liability pursuant to the doctrine of primary jurisdiction.

The question of primary jurisdiction was discussed extensively by the Court in *MP&L* with particular reference to its applicability to the facts of this case. The Court, in approving a stay of the district court damage suit and referral of issues to the Commission, found the doctrine of primary jurisdiction "particularly appropriate" to curtailment damage suits (532 F. 2d 419, 5th Cir. 1976):

> In this litigation, referral is particularly appropriate. While the Federal Power Commission's jurisdiction is somewhat limited, the Natural Gas Act, as interpreted by the courts, has provided the Commission with the statutory basis for pervasive regulation of the curtailment question.

The court identified five specific areas in which the Commission's opinion would be of "material aid" to the District Court in resolving the damage action. These were (1) a determination on the facts and circumstances that resulted in United's gas shortage, (2) determination of the scope and impact of exculpatory tariff provisions, (3) interpretation of provisions of United's contracts which might limit its liability, (4) consideration of compensation to curtailed customers, and (5) determination of

whether the presence or absence of damages significantly affects the curtailment decision.

As previously noted, United moved on June 10, 1976 to lodge the *MP&L* decision with the Commission. This request was denied by the Commission on July 19, 1976 as premature, since no referrals had yet been issued by the district courts in response to the *MP&L* decision. These referrals have now been issued, and United has moved to lodge them as indicated *supra*.

United's several motions to lodge and the answers which have been filed in opposition thereto raise the threshold issue of whether the Commission has any discretion in deciding whether to accept the questions referred by the district courts. If not, the inquiry is at an end, and the Commission would have no alternative but to accept the referred questions and attempt to determine them. United strenously argues that under the circumstances of this case action is mandatory rather than discretionary, and that the Commission is therefore obligated to set the referral issues for hearing and decision. In support of its contention United relies upon the concurring opinion in *International Paper, MP&L*, and *Int'l. Ass'n. Heat and Frost Insulators and Asbestos Workers v. United Contractors Ass'n.*, 483 F. 2d 384 (3d Cir. 1973). In discussing the referral issue in the latter case the Court stated (483 F.2d 404):

> As to the first reason—no guarantee of Board action—we believe it gives too narrow an interpretation to the doctrine of primary jurisdiction. Under the doctrine, the District Court would certify the labor issues to the Board for findings of fact concerning each alleged act and conclusions of law. *The Board is expected to honor this certification . . .* (emphasis added).

The Commission cannot agree that its consideration and determination of each of the referred questions is,

as a matter of law, mandatory. The authorities presented by United do not persuade the Commission otherwise. The Commission is obligated to determine issues as to which it has paramount or even exclusive jurisdiction under the Natural Gas Act. *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); also *Texas and P.R. Co.*, v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Thus the court in *MP&L* states that (532 F. 2d 420 (5th Cir. 1976)):

> Certainly, the interpretation and implementation of a tariff is a question properly passed in the first instance by the Commission and reference by a court to a regulatory agency may not even be discretionary on such an issue.

The *Asbestos Workers case, supra,* appears to have involved such an issue. *Thompson Newspapers, Inc. v. Toledo Typographical Union*, 387 F. Supp. 351 (E.D., Mich. S.D. 1974). Not all issues fall into this category, however, particularly those as to which the Commission lacks jurisdiction, and where its decision may not be binding on the courts. In such cases the Commission believes it should and does have discretion in deciding whether it will rule on questions referred to it by the courts under the doctrine of primary jurisdiction.[6] Thus, the Court in *MP&L*, referring to the *International Paper* and *State of Louisiana* decisions stated that (532 F. 2d 421, 5th Cir. 1976):

> Nothing we said in either case, however, implied that although a court will make the final determina-

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[6] In its order issued in this proceeding on July 19, 1976 (56 FPC 336), denying as premature United's motion to lodge the *MP&L* decision, the Commission stated:

> Without expressing any opinion at this time as to the nature of the assistance this Commission might *in its discretion* render to the District Court, we anticipate that any new factual inquiry which might proceed from a referral from the District Court would be assigned to Phase III. (Emphasis added).

> tion, that court could not and should not *seek the Commission's assistance* pursuant to the doctrine of primary jurisdiction. (Emphasis added).

The Supreme Court case of *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) appears especially pertinent. In this case, Ricci filed an antitrust complaint in U.S. District Court charging the Chicago Mercantile Exchange and others with conspiring to restrain his business. The District Court dismissed the complaint. The Court of Appeals reversed but held that the court action should be stayed until the Commodity Exchange Commission could pass on the validity of the allegations pursuant to the Commodity Exchange Act. In affirming the Court of Appeals' decision, the Supreme Court's five member majority stated (409 U.S. 304):

> We need not finally decide the jurisdictional issue for present purposes, but there is sufficient statutory support for administrative authority in this area *that the agency should at least be requested to institute proceedings.* (Footnote omitted, emphasis added).

This language of the Court clearly implies that the Commodity Exchange Commission had discretion in deciding whether or not to institute proceedings. See also *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973).

No case has been shown by United in which a trial court directed or compelled an agency to accept and decide referred issues. The Commission firmly believes that its consideration of the referred questions is discretionary rather than mandatory, and accordingly proceeds to consider the questions propounded by the district courts.

The District Court Referrals

There are two referral orders pending before the Commission. Both were issued by Federal District Court Judges of the Southern District of Mississippi. The order

issued in the Mississippi Power & Light Co. action will be referred to as the MPL referral order; that issued in the Mississippi Power Company action will be referred to as the MPC referral order. The orders are essentially similar but not identical. For convenience the referred questions will be discussed by reference to the MPL referral order.

The questions referred fall generally into the five categories specified by the court in *MP&L*. Part A of the MPL referral order sets forth six questions which bear upon the issue of whether United was guilty of negligence, bad faith, or wrongful conduct. These questions seek to ascertain, for example whether United or Pennzoil deliberately or negligently created United's gas shortage by releasing gas reserves or surrendering gas purchase contracts, or whether United or Pennzoil was negligent in failing to make reasonable efforts to acquire new reserves.

The Commission has previously considered the subject of United's possible negligence or wrongful conduct in Opinion 647-A. In discussing a potential curtailment damage action based upon United's negligence, bad faith or other wrongful conduct, the Commission stated (49 FPC 1220-21):

> With regard to the second category of cases, we have neither the power nor desire to adjudicate United's contract liability, for as recognized in *International Paper*, that is within the province of the appropriate court.

Moreover, in its order issued on August 20, 1975, in this proceeding, the Commission specifically denied United's request to expand the scope of phase III proceeding to include the issue of whether the shortage resulting in United's curtailments was caused by United's "negligent or willful misconduct." Furthermore, it has been the FPC's policy in the past not to consider questions referred by a court where the issues referred are already pending

before the court for its decision. *Merle M. Rowan, et al. v. Allied Chemical Corp.*, 39 FPC 64 (1968).

Inclusion of the questions of part A of the referral order as additional issues in phase III would substantially expand the scope of the proceeding, at great public and private expense and at the expense of further delay, all with no assurance that the Commission's final decision would be binding. Of greatest concern to the Commission, however, is the fact that the issues included in the part A questions, which presumably would be governed by the law of the State of Mississippi, appear essentially unrelated to the establishment of United's curtailment plan, which, in the final analysis, is what is involved in these proceedings, whether phase I, II or III. It appears to the Commission that its primary responsibility and function should be to establish United's curtailment plan and, in keeping with the court's decision in *State of Louisiana*, to assess the impact of that plan upon United's potential contract liability. This the Commission shall endeavor to do. However, it is the Commission's judgment that the issues in part A of the MPL referral order are not within the Commission's primary jurisdiction as thus defined.

The *Ricci* case appears relevant also to the Commission's decision on this issue. In approving referral of the controversy in that case preliminarily to the Commodity Exchange Commission, the majority in *Ricci* specifically noted the conclusion of the Court of Appeals that (409 U.S. 299):

> [T]he specific Exchange rules allegedly violated were within the bounds of adjudicative and remedial jurisdiction of the Commodity Exchange Commission. . . . (Footnote omitted.)

The majority in *Ricci* did not decide the jurisdictional issue, but it is clear that its approval of the referral was based, at least in part, upon the possibility of Commission

jurisdiction. By contrast, it is admitted by all concerned in the instant case that this Commission lacks jurisdiction to adjudicate United's possible contract liability. As a result, the Commission finds itself, on the facts of this case, in agreement with the statement of Justice Marshall in his dissenting opinion in *Ricci* that (409 U.S. 310):

> An agency cannot have primary jurisdiction over a dispute when it probably lacks jurisdiction in the first place.

Based on the foregoing considerations the Commission must respectfully decline to include the part A questions as matters to be decided in phase III.

Part B of the MPL referring order requests the Commission to determine whether any of the provisions of United's tariff or any Commission orders provide United with a defense to the damage suits. The possible effects of section 12.1 and 12.3 of the tariff on United's liability are already issues in this proceeding. The referral order also makes specific reference to section 11, which is the *force majeure* section of United's tariff.

The Commission finds these issues involve matters which are within the scope of its primary jurisdiction. Questions as to the impact of other portions of United's tariff upon its contract liability are relevant to the phase III proceeding for the same reasons the proceeding was expanded on August 20, 1975, to include the possible effect of tariff section 12.1 in addition to proposed section 12.3. A claimed defense based upon any Commission order should also be considered since, as stated in the concurring opinion in *International Paper*, the Commission has a positive duty to determine the legal and practical ramifications of its valid orders (476 F. 2d 130). The scope of phase III shall accordingly be expanded to include the issues contained in part B of the referral order.

Part C of the referral order contains five separate questions requesting the Commission to interpret the

United-MP&L contract and state whether in its opinion the contract bars or limits the imposition of liability upon United for its curtailments.

The Commission finds the issues in part C do not come within its primary jurisdiction. *Rowan v. Allied Chemical Corp. supra.* The Commission previously expressed its opinion on United's liability under the substitute fuel clauses in Opinion No. 647-A (49 FPC 1222) only to be reversed in *State of Louisiana.* In that decision the Court informed the Commission it had made the wrong inquiry, stating (503 F. 2d 867):

> In deciding whether to adopt United's proposed section 12.3 the Commission used a test of redundancy. It asked whether the new section was necessary to United's avoidance of contract liability and implicitly assigned itself the task of determining United's contract liability. Once FPC concluded United was well nigh invulnerable anyway, it decided that section 12.3 should not be adopted. An unfortunate by-product of that approach is an arguably premature determination of United's contract liability via the doctrine of collateral estoppal.

The Commission must again state that in its judgment it has primary jurisdiction in this proceeding to determine a curtailment plan governing the allocation of gas supplies on United's system and to assess the impact of that plan on United's contract liability. The Commission shall also consider the possible effect of other provisions of United's tariff and of the Commission's orders upon the liability issue. The questions in part C, however, go well beyond these limits and appear to be inconsistent with the *State of Louisiana* decision. Interpretation of the MP&L and MPC non-jurisdictional contracts under the laws of Mississippi should be left to the courts. The Commission therefore respectfully declines to include the part C issues in phase III.

Part D of the MPL referral order is comprised of two questions pertaining to curtailment compensation. The court asks (1) whether MP&L may be compensated by higher priority customers for curtailment and (2) if it is compensated, would that bar or limit the awarding of damages to MP&L.

The compensation issue is clearly within the Commission's exclusive jurisdiction. *Mississippi Public Service Commission v. F.P.C.*, 522 F. 2d 1345 (5th Cir. 1975). However, the Commission has not approved a compensation plan for United or any other pipeline. The compensation issue as to United has never been part of the phase III proceedings and it would, in the Commission's judgment, be futile now to attempt to consider compensation issues in this limited proceeding. However, the compensation issue is being considered by the Commission in a pending rulemaking proceeding of general applicability in Docket No. RM78-4. Because compensation is a matter within the Commission's exclusive jurisdiction, the Commission shall accept the part D questions, with the response thereto subject to Commission action in the rulemaking proceeding in Docket No. RM78-4.

Part E of the MPL referral order contains three questions asking whether the awarding of damages to MP&L would (1) grant MP&L an undue preference or advantage in contravention of the Natural Gas Act, (2) impair United's ability to render service, or (3) frustrate or hamper the Commission's ability to allocate United's gas supplies fairly and in accordance with the public interest.

The legal issue presented by the first question contained in part E is within the Commission's jurisdiction under the Natural Gas Act and shall therefore be accepted. The remaining two questions in part E, however, cannot be answered without speculating as to United's ultimate liability. If United is found to have no liability, these questions become moot. If United's liability is found to be

limited by the terms of its contracts, the answer to these questions could be "no." If United is found to have "open-ended" liability, the answer to these questions could be "yes." The Commission concludes that no useful purpose would be served by trying to answer these two questions prior to a determination of United's contract liability, if any.

Scope of Proceedings

Consistent with the foregoing discussion the Commission accepts referral of parts B, D and E(a) of the MPL referral order and questions 10, 12, 13 and 14(a) of the MPC referral order. The Commission respectfully declines to accept referral of all other questions. In accordance with the terms of the *State of Louisiana* decision and of this order, the scope of the proceeding in phase III shall include and shall be limited to the following issues: [7]

1. Is it within the Commission's jurisdiction and authority under the Natural Gas Act to approve proposed section 12.3 as a part of United's curtailment tariff?

2. If the answer to question 1 is "yes," should section 12.3 be approved?

3. If so, what should be the effective date of such provision?

4. What would be the effect of section 12.3 upon United's potential contract liability? Specifically, would approval of section 12.3 effectively abrogate the substitute fuel clauses contained in the contract between United and certain of its customers?

5. If so, would this serve to grant any undue preference or advantage to any person or subject any person to

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[7] These issues do not include those dealing with compensation. Further Commission action with respect to the compensation-related questions is deferred pending Commission action in Docket No. RM78-4.

undue prejudice or disadvantage within the meaning of Section 4(b)(1) of the Natural Gas Act?

6. Do any other of United's tariff provisions or any general or specific orders of the Commission remove or limit United's potential contract liability?

7. Would the awarding of damages for United's curtailments grant the recipients thereof an undue preference or advantage in contravention of the Natural Gas Act?

Admissibility of Evidence

Pursuant to the Commission's orders setting the phase III issues for hearing, United submitted extensive evidence and related exhibits. United describes its evidence in the following terms:

> This evidence, which is intended to support the Commission's jurisdiction generally to effectuate exculpatory tariffs and the justness and reasonableness of specific exculpatory provisions in United's tariffs, describes the circumstances leading to the shortage of gas on United's system and United's resulting need to curtail service to its customers. The evidence shows that an unforeseen growth in gas demand and reduction in gas supply resulted from a variety of factors beyond the control of United or any other pipeline, many of which are also in curtailment. Lastly, United's evidence explains its gas acquisition, inventory and sales policies and activities for all periods of time relative to its curtailments and demonstrates that such policies and activities were consistent with industry practice and Commission policies.

The parties, including the Commission staff argue that substantial portions of United's evidence should be stricken on grounds that the evidence pertains to the issue of whether the gas shortage on its system was caused by United's negligence, bad faith or misconduct, and that these issues have been excluded by the Commission as is-

sues in this proceeding. They also argue that if hearings are required to be held on United's evidence, these proceedings will be unduly prolonged and that burdensome matters of proof would be created.

In an order issued November 11, 1975, the Presiding Judge partially granted motions to strike portions of United's evidence, but for the most part he denied the motions. In his order of December 9, 1975, the Presiding Judge denied all motions for reconsideration of his prior ruling, and refused to refer the matter to the Commission. However, on December 16, 1975, upon further consideration of a request by the Commission staff the ruling was referred by the Presiding Judge to the Commission for its review pursuant to Section 1.28(a) of the Rules. Because this appeal involves important questions concerning the proper scope of the phase III proceeding, the Commission finds that special circumstances have been shown warranting the Commission's consideration of the Presiding Judge's rulings.

As discussed above, the issue of United's possible negligence, bad faith, or willful misconduct in causing the gas shortage on its system was excluded as an issue in this proceeding by virtue of the FPC's prior orders, notably the order of August 20, 1975. That policy is reaffirmed in this order. The Presiding Judge recognized this fact in his ruling of November 11th. He determined however that this fact was not sufficient to justify the motions seeking to strike United's testimony. While finding that certain limited portions of the evidence pertained solely to issues beyond the scope of the proceeding he declined to strike the remainder. The Presiding Judge explained the basis for his ruling as follows:

> The August 20 order has indeed, as Movants contend, created a framework for phase III. Certain issues were excluded therein and are not to be determined in this aspect of the proceeding. Therefore,

proposed evidence going exclusively to those issues clearly must be stricken.

However most of the material Movants seek to strike is not so easily compartmentalized. The order of August 20 sets out certain lines of inquiry to be pursued: the effect of section 12.3 on United's possible contractual liability; whether section 12.1 limits its general liability; whether a tariff provision can remove general contractual liability; if the provision removes liability, would the unavailability of damages subject United's curtailment customers to undue prejudice or disadvantage. If consideration of such issues requires the submission of evidence that also may relate to precluded matters, it cannot be stricken.

Moreover, the orders of March 7, April 2, and May 2, 1975, under which phase III was established, following the remand in *State of Louisiana v. F.P.C.* 503 F. 2d 844 (5th Cir. 1974), have not been superseded by the August 20 order. They created phase III in order to consider questions of the Commission's jurisdiction, the justness and reasonableness of section 12.3, and, if approved, whether effectiveness of the provision should be made retroactive to November 14, 1971. Such an inquiry is considerably broader in scope than Movants and Staff Counsel suggest. For example, on the question of the Commission's jurisdiction to place an exculpatory tariff in the nature of section 12.3 into effect. United is not precluded from attempting to establish the circumstances behind its gas shortage.

Unless proposed evidence is clearly inadmissible, the more appropriate approach is to challenge its weight rather than its admissibility. See, e.g., *American Louisiana Pipe Line Company, et al.*, 18 FPC 632, 635 (1975). Movants will have ample opportunity to do so here.

Upon review the Commission finds that the ruling of the Presiding Judge is reasonable and should be affirmed. The Commission believes the Presiding Judge was correct in his analysis of the issues presented and that his ruling was proper for the reasons stated in his order.

Rulemaking

In a pleading filed on April 25, 1977, the Commission staff argues that the phase III issues are "susceptible of general resolution" and therefore suggests that the Commission initiate a rulemaking proceeding for the purpose of determining the effect of exculpatory tariff provisions on the contract liability of pipelines. It further suggests that the phase III proceedings be stayed pending completion of the rulemaking. The staff states that its objective is not to exhaustively list the policy considerations to be addressed in the suggested rulemaking, but rather to demonstrate "that the fundamental issue in phase III is properly and necessarily resolvable through the weighing of policy considerations." None of the parties has expressed support for the staff's proposal.

The Commission finds that good cause has not been shown to undertake a general rulemaking proceeding as requested, and the staff's motion shall accordingly be denied.

The Commission finds:

The issues presented by the Presiding Judge's referral of December 16, 1975, constitute extraordinary circumstances, and a decision thereon by the Commission is necessary to prevent detriment to the public interest.

The Commission orders:

(A) Except to the extent granted by this order the motions to lodge and for declaratory relief filed herein by United are denied.

(B) The Presiding Judge's order of November 11, 1975 is affirmed.

(C) The staff's motion for initiation of a rulemaking proceeding is denied.

(D) The scope of the phase III hearing is clarified in accordance with the terms of this order.

Commissioner Holden voted present.

APPENDIX H

Map of Pipeline Routes and Rates

* $1.28 represents the rate for transporting gas on the Trailblazer System, and $.36 and $.22 reflect the rates on CIG's line and on NGPL's trunk line from Oklahoma to Beatrice, Nebraska. The rates illustrate how transportation over the new Trailblazer System was more expensive than over the older pipelines owned by CIG and NGPL. See App. 27a, 40a-41a.

No. 89-1508

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a jury award of damages to a regulated natural gas pipeline based on its customer's alleged breach of an implied contractual good-faith duty to purchase gas was preempted by federal regulation of the gas sales contract, where the federal regulatory agency had specifically invalidated the contract provisions requiring the customer (also a regulated pipeline) to purchase the gas at issue, and the damages awarded gave the pipeline seller the precise rate that had been rejected by the agency.

2. Whether the court of appeals correctly rejected the pipeline seller's attempted-monopolization claim against its customer on the ground that there was no dangerous probability of success, where, *inter alia*, (a) the seller claimed that its customer was not seeking to obtain monopoly power itself but to confer such power on a group of three other, independently owned and operated pipelines in a different market, (b) one of those other pipelines was owned by the plaintiff seller itself, and (c) the gas sales contract between the customer and seller, which was the sole tool of the customer's alleged attempt, strictly limited, in both magnitude and duration, any increase in the putative monopolist's market strength to non-monopoly levels.

AFFILIATED CORPORATIONS

Pursuant to Rule 29.1 of the Rules of this Court, respondents state: Respondent NGPL-Trailblazer, Inc., has no non-wholly owned subsidiaries and is wholly owned by respondent Natural Gas Pipeline Company of America (Natural). Natural has no non-wholly owned subsidiaries. Certain preferred stock aside, all of Natural's stock is owned by MidCon Corp., which is wholly owned by Occidental Petroleum Corporation.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 885 F.2d 683. The opinion of the district court (Pet. App. 29a-86a) is reported at 661 F. Supp. 1448.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1989. Pet. App. 1a. A petition for rehearing, with suggestion for rehearing en banc, was denied on December 12, 1989, with no judge voting for

rehearing. Pet. App. 87a-88a. The petition for a writ of certiorari was filed on March 26, 1990, within the time allowed by an extension of time granted by Justice White on February 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case involves an attempt by petitioner Colorado Interstate Gas Co. (CIG), a regulated pipeline, to obtain relief before a jury from adverse orders of the Federal Energy Regulatory Commission. In 1984, FERC invalidated the longstanding contractual minimum purchase obligations of all pipeline customers like respondent Natural Gas Pipeline Company of America (Natural) and set a specific rate that Natural was to pay for gas not purchased. FERC took those steps, fully cognizant that they would impose burdens on pipeline sellers such as CIG, in order to free customers to pick and choose among suppliers, and thereby subject pipeline sellers and gas producers to market forces. The FERC rulings were upheld against CIG's and others' challenges on appeal.

Nevertheless, when Natural exercised its right to reduce its purchases from CIG, CIG pursued the present suit to recover damages for unpurchased gas. Seeking precisely the rate that FERC had expressly rejected, CIG sued for both breach of contract and attempted monopolization. The court of appeals denied the contract claim on the ground that it was inconsistent with the FERC orders. It denied the antitrust claim on the ground that CIG had not proved a dangerous probability of success and thus had failed to transform its contract-based complaint about Natural's reductions in purchases into a claim that Natural attempted to monopolize. Petitioner challenges those rulings.

1. *Background.* a. CIG and Natural are both natural gas pipelines regulated by FERC. Under a Service Agreement between the two companies, Natural was en-

titled to buy certain volumes of gas from CIG at either a higher (H-1) or lower (F-1) rate, depending on where the gas was delivered. The Agreement also obligated Natural to pay CIG the full price for 90% of its contractual entitlement even if it actually took less gas. In particular, Section 2 of the Agreement specified minimum daily volumes of gas covered by the contract, and Section 4 specified a corresponding minimum payment, calculated annually for the volumes Natural was obliged to buy. For any deficiencies in takes of either H-1 or F-1 gas, Natural was to pay the F-1 rate.

By late 1982, there was a severe glut in the supply of natural gas. Despite that fact, pipeline sellers were able to maintain high prices because of the widespread existence of minimum purchase provisions like those in the CIG-Natural Agreement. Consequently, Natural and other pipelines found it increasingly difficult to resell gas to local distribution companies and the consumers they served. *See Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1157-59 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986). Natural responded by reducing or renegotiating its purchases under thousands of contracts with its suppliers. Tr. 3088-94; DX 2191. When Natural asked CIG to reduce the amount of high-cost H-1 gas it would have to purchase, CIG refused. *See* DX 153, 317. Finally, on July 20, 1983—three weeks after a FERC administrative law judge cast doubt on whether buyers like Natural would be able to pass on to their customers the costs of expensive gas purchased under contested minimum bill provisions (*United Gas Pipe Line Co.*, 23 FERC ¶ 63,125, at 65,352 (1983))—Natural informed CIG that it would cease taking H-1 gas, while continuing to take the lower cost F-1 gas.[1]

By that time, in a rate proceeding initiated by CIG in 1982 and contested by Natural, FERC had begun to

[1] Ten copies of the FERC orders that are pertinent to this case have been lodged with the Clerk of the Court.

examine the lawfulness of the minimum purchase provisions in Natural's contract with CIG. In October 1983, a FERC administrative law judge ruled that the minimum daily take and minimum bill provisions of Sections 2 and 4 of the CIG-Natural Service Agreement were unjust and unreasonable and therefore unlawful. 25 FERC ¶ 63,012, at 65,020-21. On May 25, 1984, the full Commission adopted the same position—both in the CIG-Natural rate proceeding (27 FERC ¶ 61,315) and in a general rulemaking applicable to the entire industry (*Order 380*, FERC Stats. & Regs. ¶ 30,571). The express aim of FERC's action was to allow customers such as Natural "to pick and choose among their pipeline suppliers" and thereby to force selling pipelines to lower their prices and negotiate lower prices from their suppliers. *Order 380* at 30,958, 30,963. *See also Order 380-C*, FERC Stats. & Regs. ¶ 30,607 (1984); *Order 380-D*, 29 FERC ¶ 61,332 (1984).

Having declared it unlawful for CIG and other pipelines to bind their customers either to take gas or to pay the full commodity rate for untaken gas, FERC specifically ordered CIG to file a new tariff providing for payment by Natural of only the fixed costs of F-1 gas for any gas not taken.[2] 27 FERC ¶ 61,315, at 61,584. CIG nevertheless tried to file a rate allowing it to charge the higher H-1 fixed costs for untaken H-1 gas, but FERC rejected that filing (29 FERC ¶ 61,124 (1984)) and instead insisted on an F-1 fixed-cost rate for any gas not taken (30 FERC ¶ 61,073 (1985)). On CIG's challenge, the Tenth Circuit affirmed, explaining that CIG's proposed H-1 fixed-cost rate would improperly give CIG full profits on unsold gas and thereby deter price

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[2] A pipeline's "fixed costs" include profits on pipeline operations as well as those costs which do not vary with the volume of gas sold. The main "variable" cost thus excluded is the cost of the gas itself. The full "commodity rate" includes both fixed and variable costs.

reductions, and this Court denied certiorari. *Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 811 (10th Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987) (*CIG I*); *see* Pet. App. 7a.[3]

The Commission's orders invalidating the minimum purchase requirements of the Service Agreement, and setting an F-1 fixed-cost rate for untaken gas, were effective as of September 1982, the date on which CIG's new tariff took effect. Accordingly, for the entire period at issue in this case—including July 1983, when Natural initially reduced its purchases of H-1 gas—Natural was under no contractual obligation to purchase CIG's gas, and the only rate CIG ever had on file with FERC for gas not taken by Natural was the F-1 fixed-cost rate, which Natural has always paid or stood ready to pay under FERC tariffs.[4]

b. Although Natural's reduction in purchases lies at the heart of this case, one of CIG's claims also involves the transportation of natural gas produced in Wyoming. CIG has long been the dominant transporter of that gas. Pet. App. 52a. In the early 1980s, a new route out of Wyoming—the so-called "Trailblazer System"—was added to the several existing pipelines providing transportation services to shippers of Wyoming gas. As the court of appeals noted, however, the "Trailblazer System" is not a single pipeline, or a single economic or legal entity in any respect. Pet. App. 18a n.15. The name refers simply

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[3] The Commission's general rule invalidating minimum purchase requirements industry-wide was also upheld on appeal. *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

[4] In setting the F-1 fixed-cost rate for gas not taken, FERC stated that it might allow even less in CIG's next rate case. 27 FERC ¶ 61,315, at 61,583. Ultimately, FERC did in fact eliminate *all* payments for untaken gas. 41 FERC ¶ 61,179, at 61,466 (1989), *petition for review pending, Colorado Interstate Gas Co. v. FERC*, No. 88-1932 (10th Cir., argued Jan. 18, 1990).

to three independently owned and operated pipelines, physically connected end to end, that together run from the Overthrust region of western Wyoming to eastern Nebraska. Each of those independent pipelines—none of which Natural controls—develops, files, and justifies its own FERC tariffs. Ownership of the three pipelines differs: Natural owns 18% and CIG owns 10% of the short western pipeline; CIG itself is the sole owner of the 265-mile trans-Wyoming pipeline; and respondent NGPL-Trailblazer, a subsidiary of Natural, owns 33% of the 447-mile eastern pipeline, which runs from eastern Colorado to eastern Nebraska.[5] Hence, any gas that flows through the entire "Trailblazer System" must flow through CIG's segment, and the eastern segment (of which Natural owns only one third) cannot receive gas except from the pipeline wholly owned and controlled by CIG.[6]

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[5] Contrary to CIG's suggestion (Pet. 7), Natural does not control even the eastern segment of the "Trailblazer System," but is simply a one-third partner in that pipeline. CIG is flatly wrong in asserting that Natural "assumed the . . . debt" of the "system." *Ibid.* Although Natural undertook contractually to pay certain charges as a shipper reserving capacity on the "system," that obligation—like any other shipper's purchase of reserved pipeline capacity—did not give Natural control over any of the three pipelines. In fact, Natural did not establish the rates charged by any of the three pipelines, received no share of the revenues from CIG's wholly owned trans-Wyoming segment, and shared in profits of the other two pipelines only in proportion to its minority ownership. Tr. 5057-60, 5071-72.

[6] The map in petitioner's appendix (at 75b) is neither in the record nor fairly reflective of the facts. For example, it incorrectly represents the "Trailblazer System" as a single entity and neglects to note that the entire 265-mile trans-Wyoming portion of that "system" is owned by CIG. It also omits the several other pipelines that compete with those drawn and that controlled 65% of the capacity to transport gas, and carried roughly 33% of the gas shipped, in the market defined by CIG in its antitrust case. DX 3093, 3017. In addition, the map mischaracterizes rates. For one thing, there is no "Trailblazer System" rate. The "rate" on CIG's

2. *The Present Lawsuit.* CIG filed this action in the District of Wyoming in April 1984, seeking damages under contract, tort, and antitrust theories, all ultimately based on the view that Natural's July 1983 reduction in purchases of H-1 gas violated the Service Agreement. CIG argued that Section 2 of the Agreement required Natural to take the specified minimum volumes and to pay *H-1 fixed costs* (the rate FERC rejected in favor of the F-1 fixed-cost rate) for H-1 gas not taken.[7] Based on that argument, CIG crafted two contract theories: first, it alleged that Natural had breached the minimum take obligation of Section 2 of the Service Agreement; second, it alleged that Natural had breached an implied contractual duty of good faith and fair dealing. The latter theory sought "the same damages" under "the same legal standards" as did the first. CIG C.A. Br. 90 n.97. CIG did not identify what amount of gas Natural would have purchased in good faith, but simply relied on Natural's failure to meet its 90% take obligation.[8]

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map is a summation of rates of the three independent component pipelines. Also, the map omits the particular rate, which was lower than CIG's rate, that attracted the only shipper (other than Natural) that CIG proved to have placed new business with the "Trailblazer System" rather than with CIG. *See* DX 2124; Tr. 4621.

[7] CIG sought $106,580,792 in "fixed costs/lost profits" for all unpurchased gas, H-1 and F-1. CIG also sought $53,216,364 in consequential damages covering minimum purchase payments it made to one of its suppliers for gas that CIG allegedly could not take and resell because of Natural's reduction in purchases.

[8] The verdict form (which was proposed by CIG) contained a single entry asking the jury to specify the contract damages if it found liability under either or both contract theories. The verdict form did not ask the jury to determine what volumes Natural would have bought in the absence of the alleged bad faith. Similarly, CIG's only evidence of contract damages focused exclusively on the Section 2 minimum. *See* PX 1769 (comparing Natural's purchases with Section 2 minimum); DX 3036 (CIG expert's damage calculation); Tr. 2552-53, 2561 (CIG expert testimony); Tr. 8622-24 (CIG closing argument reciting Section 2 basis for damages).

CIG also attempted to construct an antitrust claim out of its contract-based complaint, charging attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. CIG's claim was unusual in that it did not allege that Natural had attempted to acquire monopoly power itself. Rather, CIG asserted that Natural sought to confer monopoly power on the three separately owned pipelines that make up the "Trailblazer System" and to exclude CIG as a competitor, even though CIG itself wholly owns the trans-Wyoming portion of the "system." According to CIG, moreover, the relevant market for antitrust purposes was not a market for the sale of gas, but a market for gas *transportation* services; and it was not for all transportation of Wyoming gas, but only for *long-distance* transportation outside Wyoming, Colorado, and Utah.[9] CIG charged that Natural sought to acquire monopoly power in that market "for the Trailblazer System" by ceasing to buy CIG's H-1 gas and by allegedly tying up CIG's pipeline capacity so that CIG could not offer long-distance transportation services to other shippers of Wyoming gas.[10] Despite the different legal elements (and even different markets) involved, CIG sought as damages for the alleged attempted monop-

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[9] Most Wyoming gas traditionally has been transported to that tri-State area. Pet. App. 52a; PX 1756, DX 3017. CIG had to exclude that region in order to allege a relevant market in which it was not the dominant firm. *See* DX 2097, 3094; Tr. 6468-70.

[10] Although CIG alleges that Natural's July 1983 reduction in purchases "had the effect of tying up roughly half of CIG's long-distance transportation capacity" (Pet. 8), it provides no support for that assertion. CIG cites a page in the court of appeals' opinion (Pet. App. 23a), but neither that page nor any other passage in the opinion specifies a 50% tie-up. In fact, as the court of appeals recognized, CIG offered no evidence of what portion of its capacity was affected by Natural's action. *See* Pet. App. 22a-23a n.19. Nor did it present evidence that any shipper ever had difficulty shipping gas long-distance out of Wyoming. To the contrary, there was evidence of 70% excess pipeline capacity during this period of glut. *See* DX 3017, 3093.

olization of long-distance transportation precisely the same damages as for the alleged contract breach ($159,797,156), *see* note 7, *supra*, plus certain additional consequential damages ($15,204,555).

The jury returned verdicts for CIG on all of its claims. The district court subsequently denied a motion for judgment notwithstanding the verdict. Pet. App. 29a-86a. After eliminating certain duplicative and improper damages, and trebling the antitrust award, the court entered judgment for $412,237,972—$60,388,000 for breach of contract; $343,841,133 for attempted monopolization; and $8,008,839 for tortious interference.[11]

3. *The Court of Appeals Decision.* The court of appeals reversed the contract and antitrust judgments against Natural. Pet. App. 1a-28a. The court held first that Natural was entitled to judgment on CIG's simple breach of contract claim because Natural in fact paid CIG the F-1 fixed-cost rate that FERC had set for untaken gas. *Id.* at 4a-9a. Rejecting as "irrational[]" CIG's position that FERC had invalidated only the annual minimum bill requirement of Section 4, and not the daily minimum take requirement of Section 2, the court explained that FERC had found both requirements unlawful and had modified both, providing for F-1 fixed-cost payments for all gas not purchased on both a daily and an annual basis. *Id.* at 8a-9a. CIG's claim for an H-1 fixed-cost rate for untaken gas was therefore preempted.

Based on the same series of FERC rulings, the court also found that Natural was "free from liability for failure to purchase gas based upon the implied duty of good faith and fair dealing in the Service Agreement." Pet. App. 10a. As with the simple contract theory, the court explained, the bad-faith damages award enabled

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[11] CIG alleged and prevailed on a tort cause of action, which the Tenth Circuit held not to be preempted. Pet. App. 14a-16a. That claim is not at issue in this Court.

CIG to "obtain[] an award of damages that allowed it to collect H-1 fixed costs for unpurchased H-1 gas," yet "FERC and [the Tenth Circuit had] repeatedly denied CIG's request to modify the minimum purchase obligation of the Service Agreement to allow it to collect this rate for failure to purchase gas." *Id.* at 11a. In short, "the district court gave CIG a second chance to which it was not entitled." *Ibid.*

The court of appeals further rejected CIG's attempt to "imply a good faith limitation upon the scope of FERC's remedy for failure to purchase gas." Pet. App. 11a. To allow a jury to award a different rate whenever it found that the failure to purchase was not in good faith, the court ruled, "would permit circumvention of FERC authority through state contract law." *Id.* at 12a. The court noted that FERC itself, through an amicus filing in the Tenth Circuit, had urged reversal of the entire breach of contract award on the facts of this case. *Id.* at 12a-13a.[12] The court of appeals accordingly reversed the contract award for bad-faith failure to purchase as "impermissibly undermin[ing] the effectiveness of FERC orders." *Id.* at 14a.[13]

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[12] The court also noted that FERC had in another context (*see* p. 20, *infra*) preempted certain contractual claims while expressly declining to preempt certain tort claims. Pet. App. 13a. Without suggesting that FERC drew a rigid contract/tort distinction, the court of appeals concluded that, on the facts of this case, "FERC's modification of the contract remedy for failure to purchase gas does not limit CIG's right to seek damages for tortious interference with contract" (*id.* at 14a), whereas it does preclude CIG's contract award.

[13] The court added that the jury verdict on bad faith breach of contract would have to be set aside even if it were not preempted, because "the jury incorrectly found that Natural breached its obligation to purchase gas under Section 2 of the Service Agreement." Pet. App. 12a-13a n.10. The court explained that, in light of that fundamental error, "it is difficult to see how the jury could objectively consider the question of whether Natural acted in good faith." *Ibid.* The same doubt could apply to the jury's antitrust verdict.

The court of appeals reversed the antitrust judgment on the ground that CIG had failed to prove an essential element of its attempted monopolization claim—namely, that there was a dangerous probability of success. Pet. App. 20a-21a, 28a. The court noted the "unusual" nature of CIG's claim but declined to decide whether a defendant could, under any circumstances, be held liable for attempting to confer monopoly power on another entity. *Id.* at 17a; *see id.* at 18a n.15, 24a n.20. Assuming that such liability would be permissible in a proper case, the court concluded that the evidence made clear that there was never a dangerous probability that the "Trailblazer System" would actually acquire monopoly power as a result of Natural's actions. *Id.* at 20a-28a.

Starting its analysis with CIG's assertion that Natural's actions increased the "Trailblazer System's" market share from 41% to 54%, the court observed that those figures, while not themselves reflecting actual monopoly power, would likely support a jury finding of dangerous probability of acquiring monopoly power *if* this were a typical case involving a firm's use of economic coercion to acquire monopoly power. Pet. App. 21a-22a. The court concluded, however, that this was far from a typical case. "While the *Trailblazer System's* substantial market share demonstrates its *proximity* to monopoly status, it does not indicate *Natural's capacity* to raise the Trailblazer System's market share to a monopolistic level." *Id.* at 22a. Here, the court explained, Natural's "capacity to commit the offense, the scope of its objective, and the character of its conduct" all were "strictly determined and ultimately limited by the Service Agreement between Natural and CIG." *Id.* at 23a. Natural's power consisted of its ability to reserve capacity on CIG's pipeline, and even after Natural had exercised that power fully, it was unclear whether Natural's conduct had affected market shares. *Id.* at 22a-23a n.19. At most, "Natural was still only able to raise

the Trailblazer System's market share to 54%." *Id.* at 23a.

> Thus, *from the beginning*, Natural's decision to quit purchasing gas presented no danger that Natural could do anything more than shift 13% of the market to the Trailblazer System. The necessarily limited scope of Natural's objective leaves no room for speculation about the probability that the Trailblazer System would gain a monopoly. There was simply no reasonable chance, let alone a dangerous probability, that Natural, through the exercise of its contractual rights, could imbue the Trailblazer System with sufficient market share to be a monopolist.

Id. at 23a-24a (footnote omitted). That conclusion, the court added, was bolstered by the fact that Natural's "contractual right to tie up CIG's pipeline capacity . . . was strictly limited by the duration of the Service Agreement" and that "the Trailblazer System ha[d] no power to prevent the erosion of its market share" once the contract came to an end (as it did on September 30, 1989). *Id.* at 27a & n.24; *see id.* at 24a-28a.

ARGUMENT

The court of appeals' rejection of CIG's bad-faith breach of contract and antitrust claims is narrowly fact-bound and raises no issue of general importance. Both of the court's rulings are correct, and neither ruling conflicts with any decision of this Court or of any court of appeals. Indeed, CIG has cited no other case that involves a pipeline's claim for breach of an implied contractual good-faith duty to purchase gas under a contract that has been modified by FERC to eliminate purchase obligations.[14] Nor has it cited any case that involves an

[14] Although CIG states that there are a "substantial number of contracts periodically modified or affected by actions of regulatory agencies such as FERC" (Pet. 12), CIG pointedly does not identify a single other *case* in which agency modifications of contracts have given rise to the issues presented in this case.

attempted-monopolization claim on facts remotely similar to those presented here. CIG's petition rests on new arguments not pressed below and on overreadings or misreadings of the court of appeals' decision. The petition should be denied.

I. THE COURT OF APPEALS' PREEMPTION RULING DOES NOT MERIT REVIEW.

1. CIG incorrectly argues that the court of appeals ruled that federal law ousts "the entire body of state contract law" (Pet. 12) and "the whole panoply of contractual claims and defenses" (*id.* at 15), while preserving all claims labeled as torts (*id.* at 14-15), regardless of the precise conduct and state remedy at issue. The court of appeals made no such sweeping ruling. Instead, the court focused its analysis and holding on CIG's particular contractual claim. The court correctly and narrowly concluded that CIG's claim was preempted under well-settled law. Pet. App. 9a-14a.[15]

First, CIG's claim for H-1 fixed costs as damages is preempted under the filed rate doctrine. Because the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, forbids pipe-

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[15] CIG has sought to escape the Tenth Circuit's preemption ruling through an untimely attempt to reformulate its bad-faith breach of contract claim. Until its rehearing petition in the court of appeals, CIG's claim was wholly derivative of its simple breach of contract claim that Natural's reduction in purchases violated Section 2 of the Service Agreement: it sought precisely the "same damages" based on "the same legal standards" (CIG C.A. Br. 90 n.97). CIG relied solely on the minimum volume specified in Section 2 and disputed only the proper *rate* for that volume, contending that an H-1 fixed-cost rate was proper (while Natural contended that the FERC-mandated F-1 fixed-cost rate was the proper rate). CIG did not put in issue—and therefore neither it nor Natural put on any evidence of—the *volume* of gas that Natural would have taken had it not allegedly acted in bad faith. *See* p. 7 & note 8, *supra*. Thus, CIG's new version of the contract claim, which asserts that there is no dispute about rate but only about volume (Pet. 14), was not presented below and is therefore not properly before this Court. In any event, for the reasons explained in text, CIG's contract claim is preempted in both its new and old versions.

lines like CIG to collect any rate not on file with FERC, no court, directly or indirectly, may award a pipeline under a regulated contract a rate that differs from the rate lawfully filed with FERC. *See Arkansas Louisiana Gas Co. (Arkla) v. Hall*, 453 U.S. 571 (1981). As the court of appeals recognized (Pet. App. 11a), FERC never approved the filing of an H-1 fixed-cost rate for gas not taken under the Service Agreement. Thus, CIG's claim is nothing but an impermissible attempt to recover an unfiled rate. *See Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91-92 (1963) (direct as well as indirect claims for unfiled rate barred).[16]

Second, CIG's damages claim seeks to recover not only an unfiled rate but a rate that FERC specifically rejected; it is therefore also preempted by, because in direct conflict with, FERC's affirmative *exercise* of its exclusive rate-setting authority. FERC expressly denied CIG's request for H-1 fixed costs for gas not taken, ruling instead that the only rate for such gas was to be the F-1 fixed-cost rate. 29 FERC ¶ 61,124 (1984). CIG unsuccessfully challenged those rulings on direct review. *CIG I*, 791 F.2d 803 (10th Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). Thus, the present lawsuit is simply an impermissible collateral attack on the FERC-established rate for untaken gas. The court of appeals correctly concluded (Pet. App. 11a):

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[16] CIG's contract claim was never based on any filed rate, contrary to CIG's suggestion that all it ever sought in damages was a filed rate (Pet. 14 & n.8, 19 n.18). Its own damage expert insisted that his damage calculations were not based on any filed tariff (Tr. 2564, 2793), and other CIG witnesses testified that they could not derive their damage claim from any filed rate (Tr. 595, 656, 5654). Moreover, CIG also sought (and was awarded by the jury) consequential damages for certain minimum bill payments to an upstream supplier. Those costs are nowhere on file with FERC as a separate rate (*see* Tr. 592-93), and the jury's assessment of the full amount of those costs against Natural is inconsistent with FERC orders allocating only a portion of them to Natural.

> Through its common-law claim of breach of the contractual duty of good faith and fair dealing, CIG obtained an award of damages that allowed it to collect H-1 fixed costs for unpurchased H-1 gas. FERC and this court have repeatedly denied CIG's request to modify the minimum purchase obligation of the Service Agreement to allow it to collect this rate for failure to purchase gas. *Colorado Interstate Gas*, 791 F. 2d at 808-09. By allowing CIG to press this claim, the district court gave CIG a second chance to which it was not entitled.

See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 324 (1981) (common law damage action preempted because it was "little more than an attempt by a disappointed [regulated entity] to gain from the Iowa courts the relief it was denied by the Commission") (quoted by Tenth Circuit at Pet. App. 11a).

Third, the contract award for Natural's alleged bad-faith failure to purchase gas conflicts with FERC's orders invalidating the minimum purchase obligations of the CIG-Natural Service Agreement and similar pipeline contracts. As the court of appeals concluded, allowing that judgment to stand "would impermissibly undermine the effectiveness of [those] FERC orders." Pet. App. 14a. CIG's good-faith claim required the jury to determine whether Natural was obligated to purchase the gas in order "to accomplish the purposes of the contract" and to allow CIG "to enjoy the benefits of the contract"; the claim "emphasize[d] faithfulness to the purpose the parties agreed upon in the contract and consistency with the justified expectations of the other party." Tr. 8770-71 (jury instructions). Plainly, FERC's elimination of Natural's contractual obligation to purchase gas would be severely undercut if the same obligation could be indirectly reintroduced by a jury's ad hoc assessment of the "purposes" and "benefits" of, and the parties' "expectations" under, the contract. *Cf.*

Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 163 (1922) (uniformity of federal regulatory policy impaired by subjecting claims to post-hoc review by juries).

Thus, the Tenth Circuit properly explained that FERC's determination to free customers from express purchase obligations must have "room to breathe" (Pet. 12a), recognizing that the determination could not properly be subjected to ad hoc second-guessing by juries applying an implied "good faith" contract standard. Otherwise, the threat of liability would chill the exercise by pipeline customers of their FERC-granted freedom to "pick and choose among their pipeline suppliers" (*Order 380*, at 30,958, 30,962-63). *See Order 380-C*, at 31,187 ("a purchaser is more inclined to take the higher-priced gas than expose itself to damages resulting from a claim involving breach of contract"); *Order 380*, at 30,969 ("[I]t is important that pipeline customers be able to look at a tariff and know exactly what costs will or will not be incurred under the minimum bill."). The result would be to stall at the outset the mechanism that FERC put into place to force selling pipelines like CIG to reduce their prices and, in turn, to put pressure on the prices of their upstream suppliers. *Id.* at 30,962-63.

The impairment of FERC's important policy is especially clear in this case, because CIG is seeking damages based on allegations that FERC specifically considered when it invalidated minimum purchase obligations in the first place. FERC adopted its policy notwithstanding its express recognition that pipelines like CIG might lose sales, that customers might buy more expensive gas from other suppliers,[17] and that pipeline sellers might encounter difficulties with *their* suppliers

[17] Because gas *producers'* contracts, not modified by FERC, frequently involve a take or pay obligation, it is often prudent for a purchaser to buy nominally more expensive gas in order to avoid the costs that would otherwise be incurred if that gas were not purchased. Tr. 5641-44.

and might incur costs resulting from erratic swings on their systems. *Order 380*, at 30,963-64, 30,967-68; *Order 380-C*, at 31,185-86; *Order 380-D*, at 61,691. FERC also made clear that remedies were available before the Commission itself if a pipeline incurred unanticipated costs in meeting obligations to upstream suppliers or if a customer misused the newly granted rights by, for example, imprudently buying high-priced gas. *See Order 380-C*, at 31,185-87. Indeed, CIG itself twice unsuccessfully challenged the prudence of Natural's buying practices before FERC in Natural's rate proceedings. 34 FERC ¶ 61,280, at 61,495 (1986); 34 FERC ¶ 61,366 (1986); 30 FERC ¶ 61,222 (1985).[18] Allowing CIG's reargument of these very issues before a jury, under an implied good faith limitation on FERC's orders, "would permit circumvention of FERC authority through state contract law." Pet. App. 12a.

2. CIG erroneously argues that the court of appeals' decision rests on improper preemption principles. Pet. 15-19. The court correctly applied the well-established principles that pipeline rates are within the exclusive control of FERC (*Arkla v. Hall*, *supra*) and that claims based on state law are preempted when they "conflict with or interfere with" federal policy (*Kalo Brick*, 450 U.S. at 318-19).

CIG cites no decision conflicting with the Tenth Circuit's application of the filed rate doctrine. Nor does CIG cite any decision taking the unduly narrow view of "conflict" preemption that CIG advances. Pet. 18 & n.17. To the contrary, this Court has unanimously recognized that "State regulation . . . may be preempted as conflicting with FERC's authority . . . if [it] prevents attainment of FERC's goals." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 109 S. Ct. 1262, 1277 (1989). CIG proffers no reason or precedent suggesting that

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[18] Good faith is an element of prudence. *See National Fuel Gas Supply Corp. v. FERC*, No. 89-1025 (D.C. Cir. Apr. 10, 1990), slip op. 15.

validly adopted federal agency policies fall outside the familiar principle that a state measure is preempted when it is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941); *see, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 182 (1983).

The Tenth Circuit's decision is also wholly consistent with the several regulatory-preemption decisions relied on by CIG (Pet. 15-18). In addition to the statutory filed rate doctrine, the present case involves a "conflict" with regulatory decisions. The cases relied on by CIG, in contrast, concern the quite different standards for "field" preemption: they establish that a federal agency may occupy a field of regulation, thereby preempting state measures that do not otherwise conflict with federal law or regulation; but to do so, the agency must make its intention known with particular clarity. *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714, 717-18 (1985); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583-84 (1987). Those decisions, which themselves fully recognize the distinction between "field" and "conflict" preemption (*Granite Rock*, 480 U.S. at 581, 593; *Hillsborough*, 471 U.S. at 716, 719, 722), do not apply to a case like the present, which is governed by established "conflict" preemption principles, as the Tenth Circuit correctly concluded.[19]

3. Finally, contrary to CIG's argument (Pet. 13-14, 17-18), the court of appeals' ruling does not conflict with the agency or court decisions in either (a) the *Southern/Gulf States* case[20] or (b) the cases dealing with pipeline

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[19] The court of appeals relied on FERC's amicus brief, not to establish any sort of field preemption, but to confirm the evident meaning of the specific FERC orders with which the jury's contract damage award conflicted. Pet. App. 12a.

[20] *Gulf States Utils. Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471 & n.7, 1474 (5th Cir. 1987); *Southern Companies Services, Inc.*, 37 FERC ¶ 61,256 (1986).

curtailment of gas deliveries during periods of shortage.[21] In contrast to the present case, none of those cases involved damage awards based on a rate specifically rejected by FERC. Nor can they be deemed to conflict with the decision below simply because they involved claims labelled "bad faith" that were not held preempted. The Tenth Circuit correctly understood that conflict preemption is inherently context-specific, requiring analysis of the precise nature of the particular state-law claim and its relation to the particular agency action in question. FERC obviously is not required to preempt all claims labelled "bad faith" or none, regardless of context. It is apparent, moreover, that the cases cited by CIG involved policies, settings, and holdings quite different from those of the present case.

CIG's lead case, the Fifth Circuit decision in *Gulf States*, wholly unlike the case CIG presented in the lower courts, involved no dispute over rates. Moreover, *Gulf States* specifically stated that a trial court could not award an unfiled rate. 824 F.2d at 1471.[22] In addition, the case simply involved enforcement of an express contract provision requiring good faith negotiations over volume changes. FERC had not invalidated that provision; indeed, FERC had approved it. *See Southern Company Services, Inc.*, 37 FERC ¶ 61,256, at 61,654 n.1. Enforcement of the negotiation clause thus presented no

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[21] *United Gas Pipe Line Co.*, 35 FERC ¶ 61,344, at 61,791 & n.22 (1986), *aff'd in relevant part, United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 420, 426, 427-30 & n.15 (5th Cir. 1987). *See also Transcontinental Gas Pipeline Corp.*, 35 FERC ¶¶ 61,043, 61,340 (1986); *United Gas Pipe Line Co.*, 4 FERC ¶ 61,151 (1978); *International Paper Co. v. FPC*, 476 F.2d 121, 125 (5th Cir. 1973); *Monsanto Co. v. FPC*, 463 F.2d 799, 808 (D.C. Cir. 1972).

[22] Only by pretending that its claim in this case is not about rates (*see* note 15, *supra*) has CIG been able even to allege a conflict with *Gulf States*. Pet. 13. Not surprisingly, CIG did not cite *Gulf States* in its brief to the court of appeals. CIG cited the decision for the first time in its rehearing petition.

conflict with any FERC policy, let alone with an agency determination to invalidate certain contract provisions on an industry-wide basis.

The curtailment cases likewise present no conflict. For one thing, as the Tenth Circuit pointed out (Pet. App. 13a-14a n.11), the lead Fifth Circuit decision in the curtailment cases, *United Gas*, specifically recognized distinctions between various types of "good faith" claims and indicated that a claim of "breach of a good faith duty" (*i.e.*, a claim like CIG's) was the kind that would be preempted by FERC's policy even in the curtailment context. 824 F.2d at 428 & n.15. Moreover, unlike the ruling CIG seeks here, the Fifth Circuit ruling in *United Gas* simply affirmed FERC's own policy, which expressly preserved certain remedies for bad faith curtailments of service. The Fifth Circuit thus held that allowing those remedies under state law could not interfere with FERC goals when FERC itself had deliberately provided for such remedies in order to *preserve* the contractual service obligation to the maximum extent possible consistent with a narrow defense based on lack of fault. 824 F.2d at 427. In the present case, by contrast, FERC had *eliminated* the minimum purchase obligations to further a broad policy of allowing buyers to "pick and choose" among suppliers—a policy that would be impaired by reintroducing a duty to purchase through the uncertain "good faith" contractual duty claimed by CIG. The Tenth Circuit's recognition that the contract award in this case would conflict with FERC orders, policies, and goals does not conflict with the decisions cited by CIG.

II. THE COURT OF APPEALS' ANTITRUST RULING DOES NOT MERIT REVIEW.

1. CIG rests its principal challenge to the court of appeals' attempted-monopolization ruling on the contention that this was a case of actual monopoly. CIG asserts that the court of appeals found the actual exercise of the

power to control prices and to exclude competition but stubbornly denied any dangerous probability of monopolization. Hence, according to CIG, the decision below erroneously holds that the test for monopoly power (and its dangerous probability) is high market share rather than the ability to control prices and to exclude competition. Pet. 12, 19-28. The court of appeals, however, neither found what CIG asserts nor endorsed the principle that CIG so vehemently disputes. Accordingly, the main issue that CIG raises in challenging the antitrust ruling is not presented by this case.

The Tenth Circuit has nowhere disputed the proposition that a party has actual monopoly power when it can control prices and exclude competition. Likewise, the Tenth Circuit has nowhere held that a particular market share is a necessary requirement for an attempted-monopolization claim if there is proof of actual monopoly power. To the contrary, the Tenth Circuit has expressly recognized both that monopoly power consists of the power to control prices and to exclude competition and that "while market share is indicative of market power, it is not the sole matter to be considered in assessing a defendant's market strength." *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 161-62 (1986). *See also* Pet. App. 21a, 25a. CIG identifies no language in the opinion below that repudiates, modifies, or even questions those settled principles.

Nor does the decision below find, explicitly or implicitly, that CIG had proven the achievement of power to control prices and exclude competition. CIG's argument focuses exclusively, and repeatedly, on the court of appeals' reference to "supracompetitive prices" (Pet. App. 27a). But that reference was made in the course of an essentially hypothetical discussion—which was itself unnecessary to the holding—of the relevance of market-strength durability to a Section 2 violation. Pet. App. 24a-28a. Nowhere in the opinion did the court state that

it had before it any issue of actual monopoly power. Indeed, while expressly recognizing that supracompetitive pricing was a major evil that the antitrust laws guard against (*id.* at 25a), the court stated that it was "convinced that Natural's conduct did not threaten to give the Trailblazer System the degree of market power that would constitute a monopoly" (*id.* at 24a). And, of course, the court concluded that, from the outset, there was not even a reasonable chance that such power would be obtained. *Id.* at 23a-24a, 28a.

It is not surprising that the Tenth Circuit did not find that the "Trailblazer System" already had monopoly power over prices and competition. The jury did not find such power; the instructions did not ask it to determine whether such power had been proven;[23] and CIG did not argue to the jury that it had proven such power.[24] Nor could the Tenth Circuit have found that supracompetitive prices and power to exclude competition were established as a matter of law: CIG made no such argument, and any such argument would have been frivolous. Indeed, CIG told the court of appeals that "higher prices did not result from the putative monopolist unilaterally raising its rates above some previously prevailing competitive level." C.A. Br. 57. And far from proving that any shippers were forced to accept higher

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[23] Accordingly, such power cannot be inferred from the jury's general dangerous probability finding. The district court therefore clearly erred in drawing such an inference—and in identifying the putative monopolist—when it said that the jury found that "NGPL possessed the power to control prices and exclude competition." Pet. App. 52a. While CIG tries to suggest otherwise (Pet. 10 n.5), the jury instructions did not present the issue of *actual* monopoly power to the jury, but only of "market strength that approaches monopoly power." *See* Tr. 8777-84.

[24] CIG's closing argument, far from asserting any claim of actual monopoly power, specifically stated only that Natural "attempted to monopolize that long distance transportation market, and very closely, very closely, has come near succession [*sic*]." Tr. 8616.

prices, CIG showed that only one shipper (other than Natural) gave new business to the "Trailblazer System" rather than to CIG, and that shipper did so to obtain *lower* prices.[25] Moreover, the court of appeals specifically noted CIG's failure to prove that its loss of market share was caused by unavailability of its capacity—a necessary predicate for any claim of exclusionary effects. Pet. App. 22a-23a n 19.[26] In short, the court of appeals was not presented with, and the record does not support, CIG's current theory that this is a simple Section 2 case involving the putative monopolist's charging of supracompetitive prices.

In rewriting its antitrust theory to argue that supracompetitive prices were in fact charged, CIG studiously avoids the obvious question of who it was that actually charged such prices. (That question is inextricably entwined with the issue of dangerous probability that this Court would have to decide in judging CIG's conduct-based monopoly claim.) Plainly the "Trailblazer System" did not do so, because it simply does not charge any prices.[27] Rather, each of the three independent constituent

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[25] *See* note 6, *supra*. That some prices on the "System" were higher than CIG's prices does not support an inference of supracompetitive prices. Even if an antitrust court could find FERC-approved prices to be illegally supracompetitive (*but see Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156), such a finding could not be grounded on the fact—which is the most that CIG proved—that FERC approved some prices on the newly built "Trailblazer System" at levels higher than those on the older CIG pipeline in order to reflect contemporary construction costs. No one has ever suggested that such regulated cost-based rates are supracompetitive.

[26] In fact, CIG not only retained its existing business but actually acquired new long-distance transportation business during the period in question—a period of "record profitability" for CIG (Pet. App. 27a n.25). *See* DX 3003, Tr. 748-51, 8282. As we have noted, CIG never showed what portion, if any, of its capacity or of market capacity was affected by Natural's conduct. *See* note 10, *supra*.

[27] CIG has vigorously insisted, since trial, that its antitrust claim is that the "Trailblazer System" rather than Natural was

pipelines charged its own rates, which were established by FERC. As noted above, CIG owns 100% of one of those three while the other two are owned by a variety of companies, none of which owns more than a third of either of the other pipelines. *See* p. 6, *supra*. Thus, CIG's reticence as to which pipeline is supposed to have charged supracompetitive prices may reflect the uncomfortable fact that its antitrust theory has defendant Natural conferring a monopoly upon plaintiff CIG.

2. CIG has likewise mischaracterized the decision below in suggesting that the Tenth Circuit ruled that proof of a higher market share than 54% "is invariably a prerequisite" or "a necessary condition" for proof of an attempted-monopolization case. Pet. 22-23, 24-25. Instead, the court made just the opposite point, stating: "If this were a typical attempted monopolization case . . . we would have little difficulty in affirming the jury's finding of dangerous probability" based on the assumed 54% market share. Pet. App. 21a. Recognizing that this case is far from typical, however, the court correctly concluded that, even accepting CIG's narrow market definition or its market-share figures, the unique circumstances of the case make clear that Natural never had the ability to propel the putative monopolist—the "Trailblazer System"—to monopolistic control over long-distance transportation of Wyoming natural gas. *Id.* at 22a-28a.

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the putative monopolist. *See* Pet. App. 17a; CIG C.A. Br. 56, 58-59 & n.59, 61 n.64; Tr. 8777 (jury instruction requiring proof of "specific intent on the part of Natural to create a monopoly in the relevant market for the Trailblazer System"). Nevertheless, without overtly changing its claim, CIG now repeatedly suggests that it was *Natural* that charged supracompetitive prices and had monopoly power. *See* Pet. 3 (conduct enabled "NGPL to expand market share to 54% while charging 'supracompetitive prices'"); *id.* at 10 ("NGPL had in fact *succeeded* in exercising monopoly power"); *id.* at 11 (conduct "enabled NGPL both to increase the Trailblazer System's market share to 54% *and* 'to charge supracompetitive prices'").

The court based its ruling on three unusual factors. First, the assumed 54% market share was of inherently limited significance in the unique setting presented by CIG's claim that Natural attempted to monopolize not for itself but for a group of other entities. As the court of appeals noted, "the *Trailblazer System*'s substantial market share . . . does not indicate *Natural's capacity* to raise the Trailblazer System's market share to a monopolistic level." Pet. App. 22a. And because the "system" was the passive beneficiary of Natural's alleged improprieties, its rise in market share does not evince a "proclivity or ability to monopolize." *See* Pet. App. 18a n.15. Second, Natural's alleged misconduct was based not on economic power in the market place, which might continue and expand, but entirely on a contract right that "strictly determined and ultimately limited" Natural's ability to increase the "Trailblazer System's" market share to non-monopoly levels. *Id.* at 22a-23a. In other words, Natural had already exhausted its ability to increase the "system's" market share.[28] Third, even that

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[28] Indeed, the court observed that no causal connection had been established between the alleged market share increase and any tying up of CIG's capacity. "The record does not clearly disclose how much of the Trailblazer System's market share gain reflected increased transportation volumes because CIG was unavailable as a competitor, and how much the market share gain simply resulted from the Trailblazer System's constant sales levels in comparison with CIG's sales losses." Pet. App. 22a-23a n.19.

Because CIG's claim failed even on its own terms, the court of appeals had no occasion to question CIG's use of actual shipments (in a time of glut) as the measure of market share. Of course, it is capacity rather than shipments that determines the ability of rival pipelines to serve shippers and thereby to discipline a would-be monopolist. CIG presented no evidence whatever of the share of overall pipeline capacity or of its own capacity that was affected by Natural's conduct. The claim that 50% of CIG's capacity was affected (Pet. 8) is devoid of record support, and the court of appeals did not "confirm[]" (Pet. 24) that only the "Trailblazer System" had capacity available.

increase could not be sustained, for it was a certainty that Natural's contract-based ability to increase or maintain the "Trailblazer System's" share of the market would come to an end when the contract expired on September 30, 1989. *Id.* at 26a-27a nn.23, 24. The Tenth Circuit's ruling, resting on those unique factors (not approached in any other case identified by CIG), presents no issue of general significance warranting this Court's review.

3. Just as the Tenth Circuit's fact-specific analysis defeats CIG's effort to draw out a broad legal ruling concerning market share, so too CIG must fail in its request for review of the portion of the court's opinion pointing out the inherent time limits on Natural's ability to maintain the alleged 13% rise in the "Trailblazer System's" market share. Pet. 23-24. First, the court's holding that there was no danger that monopoly power would be obtained even for a single day makes it fanciful to suggest that the decision will be read to establish—in what would then clearly be *dicta*—that six years of actual monopoly power is outside the reach of Section 2. In its context, moreover, the Tenth Circuit's discussion does no more than emphasize that the temporary nature of an increase in market share should be considered in deciding whether a firm that has not attained monopoly power could do so by acquiring further market strength. Pet. App. 24a-27a. That conclusion is entirely correct, particularly where, as here, the defendant's time-limited conduct created no monopoly power, allowed no additional moves toward such power, and gave the putative monopolist "no power to prevent the erosion of its market share." *Id.* at 27a n.24.

4. CIG's effort to paint the decision below as raising a conflict with other circuit court decisions is no more successful than its various claims that the Tenth Circuit announced broad and novel legal principles. First, the decision below does not conflict with the Fifth Circuit's decision in *Associated Radio Serv. Co. v. Page Airways,*

Inc., 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). Pet. 20-21. Because the present case does not involve a finding that the putative monopolist actually had the ability to charge supracompetitive prices, CIG's attempt to analogize the case to *Page* fails on its own terms. Pet. 20-21. In addition, the conduct at issue in *Page*—*e.g.*, bribery of government purchasers, suborning a rival's employees during their employment, theft of trade secrets, sham litigation—was the kind that readily suggests continued expansion of the defendant's market share. 624 F.2d at 1354-55. The conduct in the present case, by contrast, was strictly limited in its capacity to expand market power of the putative monopolist, who was not even the defendant. In any event, the Fifth Circuit in *Page* expressly emphasized, "The holding of this case rests on a narrow foundation, and only those cases coming within the ambit of these particular facts should be considered." *Id.* at 1358. *See also Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 894 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) ("*Page* must be read on its facts.").

CIG also contends that the Court should take this case because the Tenth Circuit's standard for judging attempted monopolization conflicts with Ninth Circuit precedent. As articulated in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), and in subsequent decisions, the Ninth Circuit's view is that, in appropriate circumstances, dangerous probability may be inferred from conduct implementing an unequivocal specific intent to monopolize, without direct evidence of market share suggesting proximity to monopoly power. Pet. 21-22.[29] CIG's request for review on this ground is meritless.

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[29] Citing *H.J., Inc. v. ITT*, 867 F.2d 1531 (8th Cir. 1989), CIG suggests that the Eighth Circuit recently has adopted the Ninth Circuit's view. Pet. 22. In fact, the *H.J.* court expressly declined to rule on the question, noting that the findings in that case made it unnecessary to decide "whether a relevant product

Initially, the Tenth Circuit has explained that the difference between the Ninth Circuit's standard and its own —a difference, after all, not over the elements of an attempted-monopolization claim, but only over the type of evidence that suffices to prove those elements—is of little if any practical significance. *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d at 163. Even if the difference in standards warranted review in a proper case, however, this is not such a case. First, CIG urged neither the district court nor the court of appeals to adopt the Ninth Circuit standard. Second, not even the Ninth Circuit has ever dispensed with the element of dangerous probability [30] or held that dangerous probability can be inferred where, as here, the court concludes that achievement of monopoly status is impossible.[31] Finally, the jury instructions given below would not have satisfied the strict Ninth Circuit standard for inferring dangerous probability without direct market evidence,[32]

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and geographic market must be identified" (which is not always required under the *Lessig* line of cases). 867 F.2d at 1541 n.6. The 1976 Justice Department memorandum cited by CIG (Pet. 23-24), while apparently reciting the Ninth Circuit's view, did so in the course of explaining the Department's voluntary *dismissal* of a complaint in a particular case, finding the standard not to have been met. In any event, for the reasons explained in text, review of the issue is not warranted here.

[30] To the extent that CIG seeks certiorari to establish that dangerous probability of success is not an element of an attempted-monopolization case at all (Pet. 22-23), that suggestion is patently without merit. CIG did not so contend in either of the lower courts, and CIG has cited no decision of any court that so holds.

[31] *See Rickarts v. Canine Eye Registration Foundation*, 783 F.2d 1329, 1335-36 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986) (where prospect of monopoly power is "implausible," the conduct standard for inferring dangerous probability is not applicable).

[32] The Ninth Circuit has held that an inference of dangerous probability may be drawn from conduct that supports an inference of specific intent, but the latter inference is not permitted unless the conduct at issue would "enhance the firm's long-term ability to reap the benefits of monopoly power" and "makes sense only

and the evidence could not support such a finding.[33] Hence, application of the Ninth Circuit standard would not lead to a different result in this case.

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because it eliminates competition." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030-31 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). The jury in this case was not given such an instruction, but was allowed to infer the specific intent if it found that "*a* natural and probable consequence of a party's conduct was control over prices and exclusion of competition." Tr. 8781-82 (emphasis added). (The instruction giving Natural an affirmative defense if it could prove "a valid business purpose" (Tr. 8783) is not equivalent to or sufficient to satisfy the Ninth Circuit standard.) Although *Inglis* observed that "[d]irect evidence of intent" might permit reliance on more ambiguous conduct (668 F.2d at 1030), the Ninth Circuit there specifically stated, "the general standards for conduct that we discussed in the text must be the ultimate touchstone" for judging dangerous probability. *Id.* at 1030 n.15. The text referred to sets forth the strict standard quoted at the outset of this footnote.

[33] According to CIG itself, one of Natural's motives in buying gas from Wyoming producers rather than from CIG was to ship more gas over the "Trailblazer System" and thereby reduce per-unit costs. CIG C.A. Br. 7. That motive—whatever else Natural may have been charged with—"makes sense" economically wholly apart from any interest in conferring monopoly power on the three pipelines (including CIG's) that make up the "System."

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NGPL GAS PIPELINE COMPANY OF AMERICA,
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONER

Ignoring the jury's and lower courts' findings and instead citing selectively to the trial record, respondents argue that each of the two independent questions presented is not actually before the Court in this case. Respondents try to dispatch the preemption question on the ground that FERC "specifically considered" (Opp. 16) petitioner's claim when it ruled that the only rate for gas not taken is the F-1 rate. *Id.* at 2, 13-20. Similarly, respondents assert that petitioner's separate antitrust claim—that the exercise of actual monopoly power is sufficient to prove attempted monopolization—is merely a "current theory" (*id.* at 23) not fairly presented to the jury or the courts below. *Id.* at 21-23. On these bases, respondents hope to avoid the conflicts in the circuits and to sidestep the otherwise manifest errors in the two holdings challenged in the petition. There is no merit to either of respondents' pivotal claims.

I.

1. Respondents' defense of the preemption holding below turns entirely on its assertion that "FERC expressly denied CIG's request for H-1 fixed costs for gas not taken, ruling instead that the only rate for such gas was to be the F-1 fixed cost rate." *Id.* at 14. This assertion, however, simply begs the question. Petitioner does not dispute the Tenth Circuit's holding that FERC limited recovery for gas not taken to the F-1 rate. But the point of petitioner's claim is that FERC's ruling addressed only gas not taken *in good faith*. FERC has never stated that it intended to preempt the entirely separate question of what the measure of damages ought to be for gas not taken *in bad faith*. To the contrary, the Tenth Circuit acknowledged that FERC did not address this question in its *amicus* brief filed in that court (Pet. App. 11a n.9 ("FERC was not explicitly confronted with the question of whether Natural's motive for not purchasing gas would be relevant to the rate CIG could collect for that

gas")), and FERC's brief itself expressly disclaimed any intent to address the question (see Pet. 6). In fact, prior to trial in this case NGPL petitioned FERC for an order that this claim (and all of the complaint) was preempted, and FERC expressly refused to issue such an order. *Colorado Interstate Gas Co.*, 31 FERC (CCH) ¶ 61,325 at 61,743 (June 19, 1985). This is plainly *not* a case, like *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), where a disappointed litigant is using state law to seek relief that had been denied by a federal agency (Opp. 15); the federal agency here has never been presented with petitioner's claim.

For the same reason, respondents' assertion that petitioner's claim violates the filed rate doctrine is simply without merit. Petitioner has never sought recovery at an unfiled rate; rather, it has always sought recovery at the filed rate for purchased gas. This is the appropriate rate, because the remedy for bad-faith performance is to put the injured party in the position in which it would have been, but for the breach. Pet. 14 n.8. There is no dispute that the H-1 rate is the filed rate for purchased gas, and no dispute that FERC has never disapproved the use of such a rate in computing damages for gas not taken in bad faith. Thus, contrary to respondents' assertion, the essence of petitioner's claim has always been a dispute over the *volume* of gas that NGPL failed to purchase.[1]

There is, in turn, no merit in respondents' attempt to distinguish the conflict between the Tenth Circuit's holding and that of the Fifth Circuit in *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987), on the ground that this case involves a rate "specifically rejected" by FERC. Opp. 19. Both cases involved

[1] Contrary to respondents' erroneous assertion (Opp. 7 & n.8), petitioner introduced evidence of the volume of gas that NGPL would have purchased from CIG had NGPL adhered in good faith to its own least-cost gas purchasing policy. See Pet. App. 55a; Tr. 2438-439; Ex. 2159, 2206. See also, TR 1670-1677 (Leitzinger).

an allegation of the breach of duty to perform in good faith, and both were disputes about the volume of gas taken and not about rates. Yet, in *Gulf States*, the court held that "breach of an independent duty to act in good faith" is not preempted by the filed rate doctrine or the Commission's exclusive authority to set rates. Respondents' token attempt to distinguish the Fifth Circuit's rulings in the curtailment cases (Opp. 20) is unsound for the same reasons as the Tenth Circuit's analysis. See Pet. 14-15 & n.9.

2. Respondents argue that, even if the Tenth Circuit's field preemption analysis is incorrect, state law claims for "breach of the covenant of good faith" should be preempted "as conflicting with FERC's authority" because such claims constitute an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Opp. 17-18 (citing *Hines* v. *Davidowitz*, 312 U.S. 52, 67-8 (1941)). In fact, the duty to perform in good faith is incorporated in the Service Agreement, which had been approved as modified by FERC, and therefore, the obligation to act in good faith is itself part of the FERC-approved filed rate. Enforcement of that duty is entirely consistent with Congress's and FERC's stated objective of procuring the lowest gas prices for consumers. See Order No. 380-C, 49 Fed. Reg. 43,625 (1984), FERC Stat. & Reg. Preambles (CCH) ¶ 30,607 (Oct. 30, 1984) (codified at 18 C.F.R. § 154). It is NGPL's bad faith conduct—which resulted in purchases of higher priced gas—that is inconsistent with federal "purposes and objectives," not CIG's state law remedy for that conduct. See Pet. 19.

Respondents similarly argue that the threat of state law liability for breach of the implied covenant of good faith would "chill" NGPL's "FERC-granted freedom" to "pick and choose" when it will purchase natural gas. Opp. 16. That argument rests on the incorrect assumption that FERC intended to grant NGPL the "freedom" to engage in affirmative misconduct and to manipulate

its purchase decisions in bad faith. However, in the numerous FERC decisions quoted by petitioner and ignored by respondents, FERC has repeatedly held that its orders modifying liability for simple breach of contract do not preempt state law claims for negligence, bad faith, fault or willful misconduct. See Pet. 17 & n.16 and Pet. App. 1b-74b.

3. The fact that respondents' discussion of the preemption holding requires almost twice as much space as the decision itself is not surprising in light of respondents' refusal to defend in any way the rationale of the Tenth Circuit. Despite respondents' disclaimers, the Tenth Circuit's *holding* was that all common law claims "based upon breach of contract" are preempted and "[a]ctions based upon tort were not meant to be preempted. . . ." Pet. App. 14a. The court reasoned that FERC's exclusive authority to establish wholesale rates for sales of natural gas "must have room to breathe" and thus all state law claims within the "field" of contract remedies—not just claims which *conflict* with FERC's rulings—are preempted. *Id.* at 12a-14a. This issue—whether claims seeking contract damages based upon "affirmative misconduct" are preempted—was expressly left open by this Court in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981); see Pet. 15 n.11. Moreover, the Tenth Circuit's "bright line" distinction between tort and contract claims is inconsistent with the resolution of the preemption issue by the Fifth Circuit and by FERC. See Pet. 13 & nn. 7, 15 & 16.

At bottom, respondents attack the arguments advanced in the petition by recharacterizing the facts. Respondents do not, and cannot, defend the Tenth Circuit's novel holding that "field" preemption extends beyond the field of exclusive federal concern (as defined by Congress or the agency) in order to provide "breathing room" for federal interests. See Pet. 15-18. Respondents also do not defend the court's decision to infer FERC's preemptive "intent[]" (see Pet. App. 14a) from that agency's

silence, an inference which is contrary to established preemption doctrine of this Court. See Pet. 16-17. Nor do respondents offer more than a token effort at distinguishing the Fifth Circuit cases that conflict with the decision below. Because of the impact of the decision below on the substantial number of contracts which are modified or affected by orders of federal regulatory agencies (such as Order No. 380 or the curtailment orders discussed above), this Court should grant certiorari.

II.

1. Petitioners' antitrust claim is wholly independent of Sections 2 and 4 of the gas purchase agreement that was the focus of concern on the preemption claim. The agreement is relevant to the antitrust claim only to the extent it created NGPL's opportunity to control petitioners' pipeline capacity and thus exclude petitioner from the market. Respondents' attempt to confuse the antitrust issues with the FERC preemption issues is therefore without merit.

Respondent's principal opposition to the antitrust question is the assertion that "the main issue that CIG raises . . . is not presented by this case." Opp. at 21. In respondents' view, the Tenth Circuit has "nowhere disputed the proposition that a party has actual monopoly power when it can control prices and exclude competition" (*id.*), and it "was not presented with, and the record does not support, GIG's current theory that this is a simple Section 2 case involving the putative monopolist's charging of supracompetitive prices." *Id.* at 23. These assertions are flatly wrong.

Petitioner's economic expert witness expressly concluded that NGPL not only attempted, but in fact succeeded, in its attempt to confer a monopoly on the Trailblazer System:

> I have concluded that there was a significant dangerous probability that this attempt to monopolize would succeed. *I have concluded that in fact that to a very great extent it did succeed.* NGPL,

> acting on behalf of its interests in the Trailblazer, was able to largely *eliminate competition* in the long distance transportation market, increasing the market share of the Trailblazer System. They were able to force shippers, Champlin as an example, . . . *to pay higher transportation costs* to move gas to market. And . . . they were well aware of the impact that all of this had had on competition.[2]

The jury was subsequently instructed that a finding of market strength that approaches monopoly power—defined as "the ability to control prices and exclude competition"—was sufficient to establish a dangerous probability of successful monopolization. See Pet. 10 n.5. Acting on that instruction, the jury found in petitioner's favor. The district court then squarely upheld the jury's finding against respondent's motion for J.N.O.V.: "The weight of the evidence supports the jury's finding that NGPL possessed the power to control prices and exclude competition." Pet. App. 52a.

The court of appeals did not hold that the jury's finding was clearly erroneous, and it is obvious that there is no basis for such a ruling. Moreover, respondents cannot find a single word in the opinion to quote in support of their theory that the core antitrust reasoning and result in this case is "an essentially hypothetical discussion." Opp. at 21. Contrary to respondents' assertion (Opp. 25 n.28), the court of appeals expressly held that NGPL deliberately chose to tie up CIG's line, that this tie-up reflected NGPL's "ability to exclude CIG," that shippers accordingly were forced to use the more expensive Trailblazer System, and that this "predatory conduct" resulted in "rais[ing] the Trailblazer System's market share to 54%." Pet. App. 23a. The court of appeals further held that unambiguously predatory conduct that excludes a lower-priced competitor, insulates a competitor

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[2] Tr. 1715-16 (emphasis added); see also Tr. 1688 (Leitzinger) ("not only did this attempt to monopolize on the part of NGPL have a high and dangerous probability of succeeding, to a very great extent it was successful . . .").

from competition for six years and enables that competitor to impose supracompetitive prices on the marketplace, is nevertheless perfectly legal under Section 2 so long as the exercise of monopoly power is limited in market share (to no more than 54%) and limited in time:

> In this case, the Trailblazer System's ability to charge supracompetitive prices could last only as long as Natural had the contractual right to tie up CIG's pipeline capacity. This right was strictly limited by the duration of the Service Agreement. Once Natural's control over CIG's capacity ended, the market would return to the status quo since the Trailblazer System would be helpless to compete against the unused and inexpensive capacity of CIG's system.

Pet. App. 27a (footnotes omitted). The court of appeals simply failed to understand the antitrust significance of the very facts it accepted as being proved in this case.

Respondents do not and cannot dispute that such a holding is insupportable under any sound conception of the antitrust laws. They ignore *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986), in which this Court unanimously held that a " 'finding of actual, sustained adverse effects on competition . . . is legally sufficient' " to support a violation of Section 1. See Pet. 26-27. They also ignore the Justice Department's policy of challenging a merger that threatens a price increase for two years or longer. See *id.* at 23. And, finally, respondents do not dispute that these principles are equally applicable to Section 2. All respondents argue is that the court of appeals stated its holdings only "hypothetically," and the complete response to that argument is the text of the opinion itself.

2. Respondents use these same arguments to distinguish the conflict with *Associated Radio Serv. Corp.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). *Page* is distinguishable, they claim, because there is allegedly no finding here, as

there was in *Page*, of an ability to charge supracompetitive prices. Opp. at 27. But such a characterization of the court of appeals' opinion is simply fanciful. See *supra*, pages 6-7. As the jury found, transportation rates on the Trailblazer System were supracompetitive because they were higher than the rates that shippers would have paid in a competitive market, *i.e.*, one in which the capacity of a low-cost competitor (CIG) had not been deliberately tied up to eliminate it from competing to provide transportation service.[3] Thus, even if *Page* "rests on a narrow foundation" (Opp. at 27), that same foundation is present here. Pet. 20-21.

Furthermore, respondents simply ignore what makes the conflict with *Page* one of broad significance. The Fifth Circuit recognized in *Page* that predatory conduct that harms competition by raising prices violates Section 2 under a theory of *either* attempted *or* actual monopolization, and that the harm to competition is what distinguishes such conduct from a mere business tort. 624 F.2d at 1353-57 & nn. 18, 22, 25. Here, in contrast, the Tenth Circuit has held that predatory conduct that allows a competitor to charge supracompetitive prices but will last only for six years is merely an "unfair method[] of competition that only threaten[s] to have a transitory impact on the marketplace." Pet. App. 28a. This conflict goes to the heart of Section 2 and the antitrust laws, and therefore should be addressed by this Court.

3. Respondents' attempt to distinguish the conflict with the Ninth and Eighth Circuits on the standards for attempted monopolization similarly has no merit. The essense of this conflict, which just last year expanded into the Eighth Circuit and which has long been recognized by

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[3] Respondents' contention that Champlin was "attracted" to the low prices of the Trailblazer System (Opp. 6 n.5, 22) is astonishing in light of 1) Champlin's *amicus* brief in support of this petition, 2) the jury's undisturbed finding of tortious interference with contractual relations and 3) the district court's finding that "CIG's exclusion resulted in higher prices to producers, shippers, and consumers of natural gas." Pet. App. 40a-41a.

courts and commentators alike,[4] is that "an attempted monopoly violation can be found with evidence of conduct alone." *Twin City Sportservice Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1309 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982); see Pet. 21-22. This is also the standard employed by the Department of Justice. See Pet. 23-24. There is no doubt that, under this standard, the evidence in this case of conduct that actually excluded competition and raised prices would have been sufficient in the Eighth and Ninth Circuits to establish attempted monopoly.

4. This case clearly is an appropriate one in which to address these longstanding conflicts. Although respondents belabor the point that NGPL is not identical to the Trailblazer System, they do not argue, and could not reasonably argue, that deliberate predatory conduct that confers a monopoly on an affiliate is immune from Section 2.[5] The fact that NGPL exploited a contract "right" to achieve its ends does not mean that NGPL did not also exploit the Trailblazer System's "economic power in the marketplace. . . ." Opp. 25. This case is no different from a host of other Section 2 cases where the monopolistic conduct involves abuse of contractual rights, sham litigation, fraudulent patent procurement and other predatory acts. As explained in the petition (Pet. 27-28), the characteristics of the market at issue here make

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[4] See, *e.g.*, *Mobil Oil Corp.* v. *Blanton*, 471 U.S. 1007 (1985) (White J., dissenting from denial of certiorari); *E.J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (Brennan and White, J.J., dissenting from denial of certiorari.)

[5] The short answer to respondents' extended argument that NGPL had no significant interest in the Trailblazer System (Opp. 6 & nn. 5-6, 23-24 & n.27) is that the jury and the district court squarely rejected it. See Pet. App. 51a-52a. They recognized that ownership of a pipeline is not equivalent to control over the use of the pipeline, and that the substantial benefit to NGPL from forcing shippers to use Trailblazer lay not in profits but in attaining sufficient capacity to service its debt. See Pet. 7 n.3.

this case an ideal illustration of the perils of a narrow focus on market share. Given the substantial and persistent conflicts among the courts of appeals on the question presented, this Court should grant the petition to resolve the most elemental and recurring issues under the attempted monopolization portion of Section 2 of the Sherman Act.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

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No. 89-1506

In the Supreme Court of the United States

OCTOBER TERM, 1990

COLORADO INTERSTATE GAS COMPANY, PETITIONER

v.

NATURAL GAS PIPE LINE COMPANY OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner may not recover damages, on a state law claim of breach of an implied duty of good faith and fair dealing, at the rate for natural gas not purchased by respondent that the Federal Energy Regulatory Commission had previously rejected.

2. Whether the court of appeals correctly held that petitioner failed to show that respondent had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1508

COLORADO INTERSTATE GAS COMPANY, PETITIONER

v.

NATURAL GAS PIPE LINE COMPANY OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Petitioner Colorado Interstate Gas Company (CIG) and respondent Natural Gas Pipe Line Company of America (Natural) are natural gas pipelines regulated by the Federal Energy Regulatory Commission under the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, and the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.* CIG and Natural compete to purchase and transport gas out of the Overthrust region in southwest Wyoming. Since 1982, the Trailblazer System—"a series of three separately owned and operated pipelines joined end-to-end" (Pet. App. 17a n.14)—has competed with CIG's transportation system. *Id.* at 17a, 31a.[1]

[1] The court of appeals described the Trailblazer System, which runs from Wyoming to Nebraska, as follows:

In July 1982, CIG and Natural executed a seven-year contract that required CIG to deliver and Natural to purchase volumes of natural gas at two different rates: a higher "H-1" rate for gas delivered to Natural from CIG's pipeline system and the lower "F-1" rate for gas delivered from the field. Pet. App. 3a. The contract, like others entered into by pipelines during this period, contained "take-or-pay" clauses that obligated Natural to buy a certain amount of gas at specified prices and to pay for the gas even if it is not taken. See *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 412 (1986). The "minimum take" provision, Section 2, required Natural to buy and take delivery of specified volumes of F-1 and H-1 gas on a daily basis. The "minimum bill" provision, Section 4, required Natural to pay CIG for at least 90% of the specified total annual volume of gas, regardless of the volume actually taken. Pet. App. 5a-6a. "According to the minimum bill, all deficiency charges, whether arising under the F-1 or the H-1 rate schedules, are assessed at the lower F-1 rate." *Colorado Interstate Gas Co.* v. *FERC*, 791 F.2d 803, 805 (10th Cir. 1986), cert. denied, 479 U.S. 1043 (1987).

As required by the NGA, 15 U.S.C. 717c(c), CIG sought FERC's approval of the contract's rates and terms. Natural intervened in the FERC proceeding to challenge, among other things, its take-or-pay obligations under the contract. In May 1984, the Commission determined that the contract's "minimum bill is not just and reasonable," because "[t]he commodity charge [enables CIG to] recover[] both fixed and variable costs." *Colorado Interstate Gas Co.*, 27 F.E.R.C. ¶ 61,315, at 61,583 (1984); see *Colorado Interstate Gas Co.*, 25

The westernmost segment of the Trailblazer System, Overthrust, is owned by CIG and Natural, as well as four other companies. The middle segment, WIC [Wyoming Interstate Company Pipeline], is owned by CIG alone. The easternmost and longest segment of the system, Trailblazer, is owned jointly by [Natural] and two other companies.

Pet. App. 17a n.14; see also *id.* at 31a; Pet. 4, 6; Br. in Opp. 6.

F.E.R.C. ¶ 63,012 (1983).[2] Accordingly, the Commission ordered CIG "to amend the minimum bill provision of its tariff to Natural to eliminate all variable costs from the minimum bill." 27 F.E.R.C. ¶ 61,315, at 61,583.[3]

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[2] As the court of appeals explained, "[f]ixed costs are [the] costs which CIG must incur regardless of the volume of gas it sells. * * * The major * * * variable * * * cost * * * was the cost of gas." Pet. App. 6a n.5.

[3] The Commission made this modification retroactive to the date on which CIG's new tariff took effect—September 1982. *Colorado Interstate Gas Co.*, 27 F.E.R.C. ¶ 61,315, at 61,583-61,584 (1984); *Colorado Interstate Gas Co.* v. *FERC*, 791 F.2d at 805-806.

During this period, the Commission also addressed the propriety of "minimum bill" provisions on an industry-wide basis, having recognized that such "practices frustrated the move toward a competitive wellhead market initiated by Congress in the NGPA, since purchasers could not obtain access to cheaper sources of supply than those provided by the pipelines, for example, by purchasing directly from the producer." Order No. 500-H, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,867, at 31,510 (1989).

In Order No. 380, the Commission therefore required pipelines to eliminate their variable costs from all minimum bills. *Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, [1982-1985] FERC Stats. & Regs., Regs. Preambles ¶ 30,571 (1984); see also Order No. 380-A, [1982-1985] FERC Stats. & Regs., Regs. Preambles ¶ 30,584 (1984); Order No. 380-C, [1982-1985] FERC Stats. & Regs., Regs. Preambles ¶ 30,607 (1984); Order No. 380-D, 29 F.E.R.C. ¶ 61,332 (1984). As the Commission explained,

> [t]he presence of variable costs in a minimum commodity bill does two things about which the Commission is concerned. First, * * * the minimum commodity bill operates to recover variable costs that are not actually incurred by the pipeline. Second, a minimum commodity bill can serve as a barrier to competition. A customer is not likely to purchase gas from an alternate supplier if it is required to pay for gas it does not take from the original supplier.

Order No. 380, FERC Stats. & Regs., at 30,959.

The Commission acknowledged that the new rule would "have the effect of allowing certain natural gas distribution companies to pick and choose among their pipeline suppliers without incurring charges for gas they do not take." Order No. 380, FERC Stats. & Regs., at 30,958. Indeed, the Commission noted that its rule might

CIG thereafter filed with the Commission a modified tariff "by which it sought to collect F-1 fixed costs for F-1 gas which Natural did not purchase and H-1 fixed costs for unpurchased H-1 gas." Pet. App. 7a. The Commission rejected that tariff and held that, in light of earlier proceedings and the Order No. 380 series, CIG could collect only F-1 fixed costs for any F-1 or H-1 gas Natural did not purchase. *Colorado Interstate Gas Co.*, 29 F.E.R.C. ¶ 61,124, at 61,244 (1984); *Colorado Interstate Gas Co.*, 30 F.E.R.C. ¶ 61,073, at 61,120 (1985). On CIG's petition for review under Section 19(b) of the NGA, 15 U.S.C. 717r(b), the court of appeals upheld the Commission's ruling. *Colorado Interstate Gas Co.* v. *FERC*, 791 F.2d at 810-811.

2. While the rate proceeding was pending before the Commission, Natural, beginning in July 1983, stopped purchasing and taking delivery of H-1 gas from CIG. Under the contract, however, CIG remained obligated "to be ready to deliver any volumes [of gas] requested by [Natural]." Pet. App. 31a. CIG therefore "could not use the pipeline capacity reserved for [Natural] to ship natural gas to other customers." *Ibid.* CIG later "offered Natural the opportunity to reduce the capacity it reserved on the CIG system. Instead of reducing its reservation, Natural chose to increase it. Thus, Natural continued to tie up CIG's capacity, while refusing to purchase gas." *Id.* at 18a-19a. As the district court, in light of the jury's verdict, summarized the record:

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prompt pipelines to "pursue [purchasing] practice[s] which unjustly or unreasonably favor[] affiliated companies, or [are] otherwise imprudent." Order No. 380-C, FERC Stats. & Regs., at 31,186. The Commission made clear, however, that it would police and regulate such practices:

> A jurisdictional pipeline will not be able to circumvent the purpose of the Natural Gas Act if it is free to chose [*sic*] an alternate source of gas supply, because its purchasing practices are * * * reviewed semi-annually in a purchased gas adjustment * * * proceeding.

Id. at 31,186-31,187; see Order No. 380-D, 29 F.E.R.C. ¶ 61,332, at 61,690.

> CIG was consequently unable to purchase gas from its own suppliers, so it shut-in gas owned by Champlin Petroleum in the Whitney Canyon area of Wyoming. Champlin and CIG began renegotiating their contract. Champlin insisted that CIG release its rights to purchase Whitney Canyon gas. CIG acceded. The next day, [Natural] bought Champlin's Whitney Canyon gas, although [Natural] still refused deliveries from CIG. [Natural] shipped the Whitney Canyon gas through the Trailblazer Pipeline [*i.e.*, the easternmost segment of the Trailblazer System, see note 1, *supra*]. In addition to acquiring Champlin's Whitney Canyon reserves, [Natural] purchased gas from new suppliers and increased its takes from existing gas suppliers.

Id. at 31a; see *id.* at 4a.

Moreover, the record showed that

> CIG attempted to offer interruptible service to new customers to utilize the capacity left vacant by Natural's decreased purchases. Soon after CIG began to service new customers, Natural resumed purchases of gas, forcing CIG to interrupt its service to the new customers. Because the Trailblazer System could offer inexpensive, uninterrupted service, CIG's new customers switched to the Trailblazer System.

Pet. App. 19a. During the period of Natural's reduced purchases from CIG, CIG's share of the market for long-distance transportation of Wyoming gas fell from 23% to 13%. The Trailblazer System's market share, however, rose from 41% to 54%. *Id.* at 21a, 23a, 52a; see Pet. 3, 11; Pet. C.A. Br. 15.

3. CIG filed this federal court action against Natural in April 1984. As tried to the jury in the fall of 1986,[4]

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[4] In the meantime, CIG availed itself of the procedures the Commission outlined in Order No. 380-C. See note 3, *supra*. In the context of Natural's purchased-gas adjustment proceeding before the Commission, CIG therefore challenged Natural's purchasing practices—the practices that gave rise to the pending federal court action. See *Natural Gas Pipeline Co.*, 34 F.E.R.C. ¶ 61,280, at 61,495 (1986). The Commission looked into the matter and, adopting the staff report's recommendation, decided to take no corrective action

CIG claimed under state law that Natural breached its contract by not taking minimum quantities of gas under Section 2 and that, in so doing, Natural also breached its "obligations of good faith performance and due diligence." Second Amended Compl. ¶ 37; see *id.* ¶¶ 18, 19, 36-38; Tr. 8760-8761. In addition, CIG claimed that Natural had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas for the benefit of the Trailblazer System, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. Second Amended Compl. ¶¶ 28-32; see Tr. 8762; see generally Pet. App. 2a, 4a-5a, 9a-10a, 16a-17a, 31a.[5]

The jury returned verdicts in CIG's favor on each of those claims. The jury awarded CIG approximately $160 million in damages "on its breach of contract claim." Pet. App. 32a. Those damages represented the lost profits it would have earned had Natural purchased quantities of H-1 gas under Section 2 of the contract, calculated at the H-1 fixed-cost rate. *Id.* at 11a, 65a, 75a-78a. The jury also awarded CIG $175 million damages on its antitrust claim. *Id.* at 32a.[6]

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on "Natural's purchasing practices, * * * [including] the affiliate purchases issues raised by CIG." *Natural Gas Pipeline Co.*, 35 F.E.R.C. ¶ 61,366, at 61,835 (1986).

[5] CIG also claimed under state law that Natural had tortiously interfered with CIG's contract with Champlin Petroleum. CIG prevailed on that claim. Natural, on the other hand, unsuccessfully asserted federal antitrust counterclaims against CIG. See Pet. App. 14a-16a, 28a, 31a-33a, 58a-63a, 79a-80a. None of those claims is at issue before the Court.

[6] Although the jury's verdict reflected findings that Natural breached the contract and violated its duty of good faith and fair dealing, the jury entered one award for "actual damages" on CIG's breach-of-contract cause of action. See Resp. C.A. Br. Attachment 25 (verdict form), at 2. That award stemmed from the fact that CIG's complaint, which treated its breach of contract claim as one cause of action, see Second Amended Compl. ¶¶ 36-38, did not seek separate relief for Natural's refusal to take gas under Section 2 of the contract as opposed to Natural's failure to perform in good faith, see *id.* ¶ 46 (claiming "actual damages" for Natural's "willful and intentional breach of the [contract]"). And the district court's

In May 1987, the district court denied Natural's motion for judgment notwithstanding the verdict. Pet. App. 29a-86a.[7] The court determined that Natural had breached Section 2 of the contract and that the pertinent FERC orders "do not bar recovery of damages which are calculated from H-1 fixed costs." *Id.* at 65a. The court also concluded that the evidence supported the jury's verdict that Natural had breached its contractual duty of good faith and fair dealing. *Id.* at 69a-73a.[8] Turning to CIG's antitrust claim, the court held that the jury could have "conclude[d] that [Natural's] conduct was anticompetitive and that [Natural] specifically intended to monopoilze the long-distance transportation market for Wyoming natural gas." *Id.* at 58a.

4. In September 1989, the court of appeals reversed the contract and antitrust judgments against Natural. Pet. App. 1a-28a. The court first reviewed the pertinent

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instructions to the jury regarding CIG's "damages under its breach of contract claim," Tr. 8797-8798, which reflected CIG's theory of the case, see Pet. C.A. Br. 90 n.97 ("CIG claimed the same damages for each contract breach."), likewise made no such distinction:

> If you find that Natural breached the [contract] between [CIG] and Natural, then you may award [CIG] its actual damages caused by the breach. The actual damages you award should put [CIG] in as good a position as it would have been if Natural had performed under the [contract]. A proper measure of damages is the profit that [CIG] would have made if Natural had fully performed, together with any incidental damages, but less any expenses saved because of the breach.

Tr. 8798; see also Pet. App. 12a n.10.

[7] On review, the district court also eliminated certain duplicative and improper damages. After trebling the modified antitrust award, the court entered a total judgment of more than $400 million—approximately $60 million in contract damages, $340 million in antitrust damages, and $8 million in tort damages. Pet. App. 2a, 33a, 75a-82a; see Resp. C.A. Br. Attachment 2, at 1-2.

[8] The court pointed to evidence that Natural "renominated its full capacity under the [contract], yet refused to accept delivery of those volumes [from CIG] when the renomination became effective," and that Natural "singled out CIG for minimal or zero takes and failed to follow its own gas scheduling policies." Pet. App. 72a.

FERC rate proceedings and found that the "only formula for the elimination of variable costs approved in the individualized proceedings required CIG to charge F-1 fixed costs for [Natural's] failure to purchase either F-1 or H-1 gas." *Id.* at 9a. The court thus reached the "inescapable conclusion * * * that FERC regarded this as the sole remedy for failure to purchase gas under [the contract]." *Ibid.*[9] Accordingly, the court held that federal law preempted CIG's breach of contract claim for an H-1 fixed cost rate for gas not taken.

Based on the FERC rate proceedings, the court next determined that "Natural is [also] free from liability for failure to purchase gas based upon the implied duty of good faith and fair dealing in the [contract]." Pet. App. 10a. The court explained that "[t]hrough [that] claim * * *, CIG obtained an award of damages that allowed it to collect H-1 fixed costs for unpurchased H-1 gas," although "FERC and [the court of appeals] have repeatedly denied CIG's request to modify the minimum purchase obligation of the [contract] to allow it to collect this rate for failure to purchase gas." *Id.* at 11a. The court of appeals thus concluded that "[b]y allowing CIG to press [its] claim, the district court gave CIG a second chance to which it was not entitled." *Ibid.*[10]

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[9] In the court of appeals, FERC filed a brief amicus curiae, taking the position

> that while Natural failed to buy gas from CIG at a time its contract required a minimum purchase of 90% of the contract volume, the Commission has already fixed the remedy which the district court was required to follow. Under the remedy established by the Commission, CIG may collect 100% of F-1 fixed costs for past periods * * *.

FERC Br. 11. The Commission took no position "on the propriety *vel non* of the conduct in which the jury found Natural engaged, nor whether Natural violated the antitrust laws. Moreover, the Commission [did] not discuss whether the court could have fixed proper antitrust damages, such as lost profits." *Ibid.*

[10] The court rejected CIG's contention that there was an "impl[ied] * * * good faith limitation upon the scope of FERC's remedy for failure to purchase gas." Pet. App. 11a. The court stated that "limiting the scope of the FERC developed remedy for failure

Turning to CIG's antitrust claim, the court recognized that that "claim is unusual because it does not allege that Natural was attempting to gain control of the transportation market for itself. Rather, CIG alleges Natural stopped purchasing gas in order to give CIG's chief competitor, the Trailblazer System, a monopoly in the long distance gas transportation market." Pet. App. 17a.[11] Assuming "that it is possible to create a monopoly for the benefit of a third party [in violation of Section 2 of the Sherman Act]," *id.* at 18a, the court concluded that CIG "did not establish [a requisite] element[] of an attempted monopolization claim," *ibid.*, namely, "a dangerous probability of successful monopolization," *id.* at 20a.[12]

The court rejected CIG's contention that "the fact that the Trailblazer System's market share rose from 41% to 53% is sufficient evidence to support the jury's finding that there was a dangerous probability that the Trailblazer System would attain a monopoly." Pet. App. 21a. The court noted that such evidence would be sufficient "[i]f this were a typical attempted monopolization case in which the defendant was attempting to acquire a monopoly for itself through the use of economic coercion." *Ibid.*[13]

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to purchase gas in the manner suggested by CIG would permit circumvention of FERC authority through state contract law. In order for FERC's remedy to be effective, it must have room to breathe." *Id.* at 12a (citing *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 582 (1981)). And the court observed that, in light of the Commission's proceedings here and those in the curtailment context, see, *e.g.*, *United Gas Pipe Line Co.* v. *FERC*, 824 F.2d 417 (5th Cir. 1987), "[a]ctions based upon tort were not meant to be preempted by FERC's modification of the contract, while actions based upon breach of contract were." Pet. App. 14a.

[11] The court further noted that the Trailblazer System was "owned in significant part by [CIG,] the alleged victim of the monopolistic scheme." Pet. App. 18a.

[12] The court therefore had no occasion to address the "thorny issue" whether a defendant could be held liable for attempting to confer monopoly power on another entity. Pet. App. 18a.

[13] In a typical case, the court noted,

> a market share at the commencement of the defendant's predatory conduct of 41% would show that the defendant would

The court concluded, however, that this was not such a typical case. First, Natural's alleged "conduct says little about its *intended beneficiary's* (the Trailblazer System's) proclivity or ability to monopolize." *Id.* at 18a n.15. Second, the Trailblazer System's market share "does not indicate *Natural's capacity* to raise the Trailblazer System's market share to a monopolistic level." *Id.* at 22a. Third, Natural "did not use economic coercion in its attempt to monopolize," but rather "took advantage of its contractual right to stop purchasing gas from CIG to magnify the Trailblazer System's position in the market." *Ibid.*

Here, "Natural's predatory conduct consisted of exercising its contract rights with CIG to prevent CIG from offering transportation services to long distance customers." Pet. App. 23a. "By exercising *all* its rights under the [contract] to tie up the *entire* capacity it had reserved," the court determined, "Natural was still only able to raise the Trailblazer System's market share to 54%." Accordingly, the court concluded that "[t]here was simply no reasonable chance, let alone a dangerous probability, that Natural, through the exercise of its contractual rights, could imbue the Trailblazer System with sufficient market share to be a monopolist." *Id.* at 23a-24a.

The court found further support for its holding by reasoning that "[i]f the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense." Pet. App.

> not have to acquire much additional market share in order to attain monopoly control over the market * * * [and] typically indicates that a firm has substantial economic power in the market, and, therefore, has the tools at its disposal to elevate its market share to monopolistic levels.

Pet. App. 21a-22a. The court had no occasion to decide the "minimum market share necessary to indicate a defendant has monopoly power," although it observed that other "lower courts generally require a minimum market share of between 70% and 80%." *Id.* at 21a n.18.

25a.[14] Since the "Trailblazer System's ability to charge supracompetitive prices could last only as long as Natural had the contractual right to tie up CIG's pipeline capacity," roughly six years from the initial tie-up, and since CIG would not be driven out of the transportation business before that right expired, the court determined that Natural's conduct did not "threaten[] to create substantial and persistent changes in the marketplace." *Id.* at 27a. In sum, the court concluded that "there was no dangerous probability that Natural would bestow upon the Trailblazer System the degree of market power either in terms of market share or persistence, necessary for the monopolization offense." *Id.* at 28a.

DISCUSSION

Despite the broadside attack on the court of appeals' decision leveled by CIG and its amici, see, *e.g.*, Pet. 12; Amici Br. 8, the judgment below raises two relatively narrow and distinct issues, namely, whether pertinent FERC orders barred CIG's state law contract claim based on Natural's failure to take H-1 gas, and whether CIG established that Natural had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas. In our view, the court of appeals—based on the particular record in this case—correctly resolved both issues. And since the decision below does not present any square conflict with another court of appeals decision, arises in an unusual factual context not likely to be replicated, and is thus an unsuitable vehicle for addressing generally applicable issues of federal preemption or attempted monopolization under the Sherman Act, further review is not warranted.

1. a. Under Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), the Commission exercises exclusive author-

[14] The court qualified its analysis, stating that "[o]nly when an alleged monopolist faces substantial competition from a *known competitor* who will enter the market in a *definite period of time*, ought courts to decline to find sufficient market power to satisfy the requirement for the monopolization offense." Pet. App. 26a n.23.

ity to determine the reasonableness of filed rates, and no seller of interstate gas may lawfully collect a rate higher than that filed and approved by the Commission. See, *e.g.*, *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 963-965 (1986); *Arkansas Louisiana Gas Co.* v. *Hall* (*Arkla*), 453 U.S. 571, 576-577 (1981). As this Court has recognized, the Commission exercises "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988), which necessarily includes the power to fix and enforce rates for those transactions. And under the filed rate doctrine,[15] "the right to a reasonable rate is the right to the rate which the Commission * * * fixes, and * * * except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its [*sic*] opinion, it is the only or the more reasonable one." *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-252 (1951).

As a consequence of that statutory scheme implicating the filed rate doctrine, this Court has made plain that courts, in the context of resolving actions filed under state law, lack authority to award damages that represent a change in the rate for natural gas approved by the Commission and provided by Congress in the NGA and NGPA. *E.g.*, *Arkla*, 453 U.S. at 578-579; *Montana-Dakota*, 341 U.S. at 251-252. As this Court stated,

> the mere fact that respondents brought this suit under state law would not rescue it, for when Congress has established an exclusive form of regulation, "there can be no divided authority over interstate commerce." * * * Congress here has granted exclusive authority over rate regulation to the Commission. In so doing, Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file. It

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[15] The "filed rate doctrine," as this Court has stated, generally "prohibits a federally regulated seller of natural gas from charging rates higher than those filed with the [Commission] pursuant to the Natural Gas Act." *Arkla*, 453 U.S. at 573.

> would surely be inconsistent with this congressional purpose to permit a * * * court to do through a breach-of-contract action what the Commission itself may not do.

Arkla, 453 U.S. at 580; cf. *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

b. In light of the foregoing principles, the court of appeals here correctly concluded that pertinent FERC orders barred CIG's state law contract claim based on Natural's failure to take H-1 gas. In the context of reviewing CIG's tariff filings, the Commission considered and determined Natural's liability for failure to perform its contract with CIG, *i.e.*, Natural's refusal to purchase quantities of H-1 gas. As the Commission made plain, "CIG was prohibited from requiring Natural to purchase gas under either the minimum bill or minimum take provisions of its [contract], or from collecting variable costs for gas not purchased under those provisions." *Colorado Interstate Gas Co.*, 31 F.E.R.C. ¶ 61,325, at 61,742-61,743 (1985). In other words, the Commission concluded that CIG could collect only F-1 fixed costs for any F-1 or H-1 gas Natural did not purchase. *Colorado Interstate Gas Co.*, 29 F.E.R.C. ¶ 61,124, at 61,244 (1984); *Colorado Interstate Gas Co.*, 30 F.E.R.C. ¶ 61,073, at 61,120 (1985).

The record shows, however, that CIG based its state law claim of breach of an implied duty of good faith and fair dealing principally on Natural's failure to purchase quantities of H-1 gas and thus sought (and recovered) H-1 fixed costs. See pp. 6-7, *supra*.[16] Such a state law claim,

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[16] Indeed, a comparison of the jury instructions on CIG's interrelated contract claims confirms this point. With respect to CIG's breach of contract claim, the instructions identified the following principal elements: that "Natural failed to request on a daily basis the minimum specified volume [of gas] under Section 2 of the [contract]" and that "Natural failed to pay the proper fixed costs associated with the volumes not taken under Section 2." Tr. 8767. With respect to CIG's claim of breach of good faith and fair dealing, the instructions identified the following principal elements: that Natural "must do nothing destructive of [CIG's] right to enjoy the benefits of the contract," that "[g]ood faith performance of the contract emphasizes faithfulness to the purpose [CIG and

in the context of the extensive FERC proceedings, seeks to reopen precisely what the Commission had already resolved—the measure of CIG's recovery for Natural's failure to purchase H-1 gas as required by the contract. As the court of appeals therefore correctly concluded, "[b]y allowing CIG to press this claim, the district court gave CIG a second chance to which it was not entitled." Pet. App. 11a.

c. CIG seeks to avoid this straightforward application of federal law, and deprive the Commission's proceedings of significance, by asserting that the Commission had no occasion to consider the consequences of Natural's bad faith conduct in refusing to purchase H-1 gas under the contract. See Pet. 16-18; Reply Br. 1-4. That asserted distinction is unpersuasive. First, FERC, in the context of the protracted rate proceedings in which CIG unsuccessfully sought approval to recover H-1 fixed costs for gas not taken, drew no such distinction. To the contrary, the Commission limited CIG's recovery to F-1 fixed costs. See pp. 2-4, *supra*.[17] Second, to the extent

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Natural] agreed upon in the contract and consistency with the justified expectations of [CIG]," and that Natural "was * * * required not only to act honestly, but also to observe reasonable commercial standards of fair dealing in the natural gas industry." Tr. 8770-8771. Thus, the linchpin of CIG's contract claims was Natural's failure to purchase H-1 gas.

[17] For that reason, CIG mistakenly claims (Pet. 13 & n.7, 17 & n.15; Reply Br. 3) that the court of appeals' decision conflicts with the Commission's "curtailment cases" such as *United Gas Pipe Line Co.* v. *FERC*, 824 F.2d 417 (5th Cir. 1987). There, the Commission's orders under review permitted pipelines to pursue and recover damages on certain fault-based claims. *Id.* at 426-428.

CIG and its amici also err in contending (Pet. 13-15; Reply Br. 2-3; Amici Br. 9-10) that the court of appeals' decision conflicts with *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). There, the court of appeals, in upholding the Commission's determination, held that the plaintiff could pursue its contractual claim against the defendant for refusing to negotiate in good faith but that "[t]he district court may not compensate [plaintiff] on the theory that it would have paid rates different than the filed rates if [defendant] had not breached." *Id.* at

CIG raised before the Commission the issue of Natural's bad faith purchasing practices, the Commission expressly declined to alter its ruling that limited CIG's recovery to F-1 fixed costs. See note 4, *supra*; see also note 9, *supra*.

d. In these circumstances (involving FERC orders prescribing the measure of recovery for nonperformance of the purchase obligation at issue), the court of appeals had no need to consider the preemptive effect of the Commission's industry-wide Order No. 380 (note 3, *supra*) in holding that federal law barred CIG's contractual claim. Accordingly, this case is not the vehicle CIG and its amici describe (Pet. 15-19; Reply Br. 3-5; Amici Br. 11-13) for addressing the extent to which the Commission's general orders affecting outstanding contracts subject to its rate jurisdiction impliedly preempt state law causes of action based on failure to perform those contracts.[18]

Moreover, two other considerations make further review of CIG's broader preemption issue inappropriate. First, to the extent CIG complains of the Commission's failure to address a pipeline's bad faith conduct in its general orders, CIG is mistaken. See Order No. 380-C, FERC Stats. & Regs., at 31,186-31,187; Order No. 380-D, 29 F.E.R.C. ¶ 61,332, at 61,690; note 3, *supra*. Second, there is only one pending proceeding before the Commission involving the preemptive effect of Order No. 380 on state law causes of action, and petitioner cites no other cases raising that issue in the lower courts.

1471. Here, by contrast, CIG's contractual claim sought recovery based on the rate for natural gas not purchased by Natural that the Commission had previously rejected. See pp. 6-7, *supra*; see also Br. in Opp. 19-20.

[18] There is considerable force to petitioner's criticism (Pet. 18-19) of the court of appeals' reliance—in the preemption context—on the need for "room to breathe." Pet. App. 12a; see *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985). Nonetheless, since the court's statement was unnecessary to its judgment, further review of that aspect of the opinion below is not warranted.

2. a. In order to prevail on its antitrust claim that Natural had attempted to monopolize the market for long-distance interstate transportation of Wyoming natural gas, CIG needed to show, among other elements, that there was a "dangerous probability of success in monopolizing [that] market." *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos.*, 783 F.2d 159, 161 (10th Cir. 1986). In reviewing that claim, the court of appeals recognized the peculiar context of CIG's complaint, namely, that "Natural's predatory conduct consisted of exercising its contract rights with CIG to prevent CIG from offering transportation services to long distance customers" and that Natural had "exercis[ed] *all* its rights under the [contract] to tie up the *entire* capacity it had reserved." Pet. App. 23a. This context altered the usual analysis. In these circumstances, the court treated CIG's claim as amounting to one of actual monopolization because the full potential market impact of Natural's conduct had been achieved—a characterization neither CIG nor Natural disputes before this Court, see, *e.g.*, Pet. 26, 27; Br. in Opp. 20-22. The question of probability of success had resolved itself into the question whether success had been achieved. Accordingly, in focusing on whether "the fact that the Trailblazer System's market share rose from 41% to 53% is sufficient evidence to support the jury's finding that there was a dangerous probability that the Trailblazer System would attain a monopoly," Pet. App. 21a, the court of appeals addressed whether this monopoly had actually been attained.

In finding such market share evidence alone insufficient to establish CIG's antitrust claim, the court of appeals necessarily determined that CIG had failed to prove that the Trailblazer System had the power to exclude competition and control prices, *i.e.*, monopoly power. See *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). And nothing about the actual impact on competition or prices can be inferred from the jury's verdict, because the jury had been instructed that it could find liability even if monopoly power had not been achieved. See Tr. 8777-8784. CIG contends (Pet. 16;

Reply Br. 7), however, that the court of appeals found that Natural's conduct resulted in supracompetitive pricing: "In this case, the Trailblazer System's ability to charge supracompetitive prices could last only as long as Natural had the contractual right to tie up CIG's pipeline capacity." Pet. App. 27a. But that statement, which does not refer to any evidence of supracompetitive pricing,[19] cannot bear the weight CIG would have it carry. When read in context, namely, after the court had already concluded that there was no reasonable chance that Natural could confer monopoly power on the Trailblazer System, see Pet. App. 23a-24a, the statement suggests only that the duration of any ability to charge supracompetitive prices would be limited.

With respect to any exclusion of competition, the court of appeals noted that, as a result of Natural's exercise of its contract rights, CIG could not offer on a firm basis "a certain amount of space in CIG's pipeline" to others. Pet. App. 23a.[20] Nonetheless, the court pointed to the absence of record evidence to show "how much of the Trailblazer System's market share gain reflected increased transportation volumes because CIG was unavailable as a competitor, and how much the market share gain simply resulted from the Trailblazer System's constant sales level in comparison with CIG's sales losses." *Id.* at 22a-23a n.19. Moreover, the court noted that CIG enjoyed "record profitability during Natural's tie-up." *Id.* at 27a n.25. The court of appeals therefore appears to have

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[19] Indeed, the court also noted that the Trailblazer System could offer "inexpensive, uninterrupted service." Pet. App. 19a.

In passing, CIG refers (Reply Br. 8 n.3) to the district court's statement in its post-trial opinion that "CIG's exclusion resulted in higher prices to producers, shippers and consumers of natural gas." Pet. App. 40a-41a. The district court, however, was not the trier of fact. There are, moreover, remedies available before FERC for imprudent or unreasonable charges. See notes 3 and 4, *supra*.

[20] The court had also noted, however, that CIG could and did offer that capacity on an interruptible basis. Pet. App. 19a. CIG, moreover, did not request FERC to relieve it from this aspect of the contract obligation, in light of Natural's nonperformance of the purchase obligation.

found that the record did not show that Natural's conduct excluded competitors from the market.

b. As we read the court of appeals' decision, the court held that in the absence of evidence of direct proof of monopoly power, the market share evidence presented by CIG was insufficient to support its antitrust claim. For that reason, unlike CIG and its amici (see, *e.g.*, Pet. 12, 19-23, Reply Br. 6-7; Amici Br. 13-15) we do not read the court of appeals' opinion as adopting what would be a plainly incorrect proposition of law—that a firm cannot monopolize unless it has a market share greater than 54%. See *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528 (1948) ("relative effect of percentage command of a market varies with the setting in which that factor is placed"); *Hayden Publishing Corp.* v. *Cox Broadcasting Co.*, 730 F.2d 64, 68-69 & n.7 (2d Cir. 1984); *Broadway Delivery Corp.* v. *United Parcel Service of America, Inc.*, 651 F.2d 122, 131 & n.15 (2d Cir.), cert. denied, 454 U.S. 968 (1981); *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1352 & n.18 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981). Indeed, in a recent decision, the Tenth Circuit emphasized that

> [w]e do not view *Colorado Interstate Gas* as establishing a firm market share percentage required before a finding of monopoly power can ever be sustained. We prefer the view that market share percentages may give rise to presumptions, but will rarely conclusively establish or eliminate monopoly power.

Reazin v. *Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 967-968 (10th Cir.), cert. denied, 110 S. Ct. 3241 (1990); accord *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos.*, 783 F.2d at 162 (cited by court of appeals for proposition that "[t]he likelihood of successful monopolization is *typically* evaluated by examining the defendant's share of the relevant market," Pet. App. 21a (emphasis added)).

c. To be sure, we share the concerns raised by CIG and its amici (see, *e.g.*, Pet. 20-21, 23-24; Amici Br. 15-16) about that aspect of the court of appeals' opinion relying on the six-year term of the contract as evidence that any

monopoly power would be transitory. See Pet. App. 24a-28a. A transitory ability to extract high prices from consumers is of less antitrust concern than an enduring ability to charge such prices. Nonetheless, there is no sound basis for the court of appeals' apparent conclusion that Section 2 of the Sherman Act may not apply to substantial market power acquired through predatory means, if the duration of that power is fixed in advance and the parties whose entry will eventually dissipate it are identified.[21] In our view, six years of lost consumer welfare resulting from predatory conduct certainly implicates Section 2.

The court of appeals' misstatement about the scope of Section 2, however, does not call for this Court's review. That aspect of the court of appeals' opinion was not necessary to its judgment, since it had already held on other grounds (as noted above) that there was "no reasonable chance, let alone a dangerous probability, that Natural, through the exercise of its contractual rights, could imbue the Trailblazer System with sufficient market share to be a monopolist." Pet. App. 23a-24a. Indeed, the court prefaced its discussion by stating that "if we look beyond market share statistics, we are further convinced [that CIG's antitrust claim fails]." *Id.* at 24a. Further review of the court of appeals' alternative basis for rejecting CIG's antitrust claim, accordingly, is unnecessary.

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[21] Neither of the cases the court of appeals cited supports its narrow reading of Section 2. In *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 810 F.2d 243 (D.C. Cir. 1987), the plaintiff claimed that the defendant exercised monopoly power for one year because the defendant's competitor could not deliver the product during that period. The D.C. Circuit rejected the "proposition that a seller who can deliver a product sooner than a *known* competitor is a monopolist under the antitrust laws for the period in which he alone is able to deliver." *Id.* at 251-252. And in *Metro Mobile CTS, Inc.* v. *Newvector Communications, Inc.*, 661 F. Supp. 1504 (D. Ariz. 1987), as a result of the regulatory delay in its entry into the relevant market, the plaintiff contended that the defendant had monopoly power during that "headstart" period. The court recognized that "it may be possible to have 'temporary monopoly power' in another context," but held that the plaintiff had shown no such power on the record presented. *Id.* at 1523.

d. Finally, as CIG suggests (Pet. 20), there is confusion among the lower courts regarding the standards for attempted monopolization under Section 2 and courts continue to have difficulties in distinguishing between business torts and actionable conduct that threatens competition. This case, however, is not a suitable vehicle for addressing those issues under Section 2. First, in light of the peculiar record, the court of appeals treated CIG's antitrust claim as alleging actual monopolization—a characterization neither CIG nor Natural disputes here. Second, CIG's claim arises in a particular regulatory context in which relevant legal principles may not apply in the same manner that they would to firms in other market contexts. Third, this case has an unusual (if not unique) factual context, *i.e.*, where the alleged predatory conduct is the manipulation of rights created by contract between the plaintiff and the defendant and where the plaintiff has a share in the entity on which the defendant is alleged to have conferred monopoly power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 89-1508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

COLORADO INTERSTATE GAS COMPANY,
Petitioner,
v.
NGPL GAS PIPELINE COMPANY OF AMERICA,
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES

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PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES

On May 14, 1990, this Court solicited the views of the United States concerning the two issues presented in the petition. After five months, the Solicitor General has expressed the view that both legal issues, which arise directly out of the opinion of the Tenth Circuit, are important. See Br. 15 n.18 ("There is considerable force to petitioner's criticism . . . of the court of appeals' reliance —in the preemption context—on the need for 'room to breathe' "); *id.* at 20 ("there is confusion among the lower courts regarding the standards for attempted monopolization under Section 2 and courts continue to have difficulties in distinguishing between business torts and actionable conduct that threatens competition"). Obviously, great deference is owed to these views because they represent the considered judgment of the Solicitor General and the Antitrust Division of the Justice Department as to the significance of the court of appeals' pronouncements on these two important matters in which they have programmatic and litigating interests.

Notwithstanding the apparent worthiness of the issues presented for review, the Solicitor General ultimately does not urge the Court to grant the petition. The government argues instead that, even though the court of appeals' actual opinion is largely indefensible, the language chosen by that court was not necessary to the court's holdings. The Solicitor General, however, is in no better position than is this Court to read the opinion below and determine what it decides; accordingly, the Solicitor General's view on what issues are actually posed by a particular opinion are not entitled to special deference. The Court therefore should accept the government's view that both issues presented are important and read the Tenth Circuit's opinion for itself to decide which issues are in fact presented.

I.

At least once in recent years, this Court has not found the Solicitor General's reluctance to support an antitrust petition dispositive. In *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), the FTC was compelled to file its petition for certiorari under its own litigating authority because the Solicitor General refused to support the petition. See Pet. 1 n.1 in No. 84-1809 (filed May 17, 1985). The facts in that case were certainly unusual, and yet the Court granted the petition and established the bedrock principle under Section 1 that proof of anticompetitive effects eliminates the need to prove market power. Because this case presents an opportunity for the Court to extend that principle to Section 2 and to resolve the longstanding conflict in the circuits over the elements of attempted monopolization, this Court should grant the petition.

1. The Solicitor General's lead arguments on the antitrust question seriously mischaracterize the court of appeals' opinion and the petition. The government first states (Br. 16) that "the court treated CIG's claim as amounting to one of actual monopolization . . . ." This simply is not true. The court of appeals did *not* treat the case as one of actual monopoly; rather, it held that petitioner could not prevail on its attempted monopolization claim because of its "failure to show [one of the elements of attempted monopolization, namely] a dangerous probability of successful monopolization." Pet. App. 20a. In the Tenth Circuit's interpretation (*id.* at 20a-24a) of this element of attempted monopolization, "proximity to monopolistic status is not enough; the defendant must also have the ability to propel itself to monopolistic control over the market." *Id.* at 22a. The court of appeals then held that there was "no danger that Natural could do anything more than shift 13% of the market to the Trailblazer System" and thus no reasonable chance "that Natural, through the exercise of its contractual rights, could imbue the Trailblazer System *with sufficient market share to be a monopolist.*" *Id.* at 23a (emphasis added); see also *id.*

at 22a (citing cases from the Seventh and Eighth Circuits for the proposition that "50% market share insufficient to show dangerous probability of successful monopolization"); *id.* at 21a n.18.[1]

The Solicitor General's related assertion that by treating the claim as one of actual monopolization, the Tenth Circuit "necessarily determined that CIG had failed to prove that the Trailblazer System had the power to exclude competition and control prices, *i.e.*, monopoly power" (Br. 16) is equally erroneous. The government does not cite any statement in the opinion below as support, and no support can be found. The court of appeals neither stated the standard for proving actual monopolization nor cited any cases involving actual monopolization. What is —and remains—astonishing about the court of appeals' decision is that in the course of explaining why CIG failed to prove a dangerous probability of successful monopolization, the court of appeals accepted without question facts that are themselves sufficient to prove actual monopolization. The court of appeals found *both* that Natural had the "*ability to exclude* CIG" from competing for 13% of the market (Pet. App. 23a) (emphasis added), *and* that this exclusion gave Natural "the *ability to charge supracompetitive prices*" to producers in the Overthrust for seven years, after which "the Trailblazer System would be *helpless to compete against the unused and inexpensive capacity* of CIG's system." *Id.* at 27a (emphasis added).[2]

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[1] The government's related assertion (Br. 16) that CIG does not dispute the Tenth Circuit's characterization of its claim as one for actual monopolization is galling. Until the government's brief, no one had even proposed reading the court of appeals' opinion in this way. CIG's point is simply that the court of appeals accepted, as true, facts that would be sufficient to prove actual monopolization, making more stark that the Tenth Circuit erred in holding that as a matter of law CIG failed to show a dangerous probability of achieving a high market share.

[2] Conspicuously absent from the Solicitor General's attempt to cast doubt upon whether NGPL's exclusionary conduct forced producers and consumers to bear the cost of supracompetitive trans-

If, as the government now suggests, the court of appeals had meant to apply the standard for actual monopolization, it could never have made these findings.

We emphasize, therefore, that the court of appeals did not hold that CIG failed to prove actual monopoly. No amount of rereading or reinterpreting by the United States can disguise the fact that the court of appeals squarely held—based on "market share statistics" alone (*id.* at 24a)—that CIG failed to prove one element of *attempted* monopoly, a dangerous probability of success.[3]

2. The court of appeals' holding therefore squarely conflicts with two lines of decisions in the courts of appeals. First, it conflicts with the established position of the Ninth and Eighth Circuits that all elements of attempted monopolization—including dangerous probability of success—may be proved solely through evidence of unambiguously predatory conduct, without regard to the level of market share.[4] Second, it conflicts with cases in

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portation prices is any mention of the facts that: (1) the District Court squarely held that the record contained evidence from which a jury could conclude that "prices actually increased" (Pet. App. 52a-53a, 40a); (2) the record is replete with such evidence (*e.g.*, Tr. 1715, 1865-66); and (3) one of the producers who was forced to pay these prices has filed a brief in support of the petition (see Br. of Union Pacific Resources Co. as *amicus curiae*). That the jury was not asked to make specific findings of such pricing is not surprising —this was, after all, an *attempt* case.

[3] The remainder of the court of appeals' antitrust discussion (Pet. App. 24a-28a) sets forth the view—which the United States concedes is incorrect (Br. 18-19)—that six years of supracompetitive pricing is insufficient to state a claim under Section 2. Regardless of whether this discussion was necessary to the holding, it is absolutely clear that the discussion that precedes it did not treat CIG's claim as one of actual monopolization.

[4] *E.g.*, *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979) ("in the absence of proof of relevant market and market power, the plaintiff must prove either predatory conduct or a per se violation of § 1 to prove an attempt to monopolize"); *Twin City Sportserv., Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1309 (9th Cir.), *cert. denied*, 459 U.S. 1009

the Fifth and Second Circuits holding that both attempted and actual monopolization may be proved with a market share of 50%.[5] Notably, the United States does not dispute petitioner's statement of the law in these circuits (see Br. 18, 20); it argues only that the Tenth Circuit did not treat this case as one involving attempted monopolization, and this argument is simply untenable.

3. The only remaining issue, then, is whether this case is an appropriate vehicle to take up these circuit splits. The United States offers three cryptic assertions why it is not. First, the government restates its view that "the court of appeals treated CIG's antitrust claim as alleging actual monopolization," (Br. 20) which is simply wrong, as the foregoing argument and the plain language of the opinion (Pet. App. 20a-24a) establish.

Second, the government states that "CIG's claim arises in a particular regulatory context in which relevant

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(1982) (predatory conduct "in itself" is sufficient); *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 504-05 (9th Cir. 1977) ("market share approaching monopoly is not required"), *cert. denied*, 434 U.S. 1040 (1978); *Portland Retail Druggists Ass'n* v. *Kaiser Found. Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981), *cert. denied*, 469 U.S. 1229 (1985) (same); *Thurman Indus., Inc.* v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1378 (9th Cir. 1989) (same); *Blanton* v. *Mobil Oil Corp.*, 721 F.2d 1207, 1214 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985) (same); *H.J., Inc.* v. *International Tel. & Tel. Corp.*, 867 F.2d 1531, 1540-43 (8th Cir. 1989) (following *Twin City*); *Conoco Inc.* v. *Inman Oil Co.*, 774 F.2d 895, 904-05 & n.6 (8th Cir. 1985); *Trace X Chemical, Inc.* v. *Canadian Indus., Ltd.*, 738 F.2d 261, 265 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

[5] *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Domed Stadium Hotel, Inc.* v. *Holiday Inns, Inc.*, 732 F.2d 480, 490-91 (5th Cir. 1984) (citing cases from several circuits finding attempt with less than a 50% market share); *Hayden Publishing Co.* v. *Cox Broadcasting Corp.*, 730 F.2d 64, 68-69 & n.7 (2d Cir. 1984); *Broadway Delivery Corp.* v. *United Parcel Serv., Inc.*, 651 F.2d 122, 130 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981).

legal principles may not apply in the same manner that they would to firms in other market contexts." (Br. 20). The United States does not say, however, what these inapplicable "relevant legal principles" might be. In fact, this Court, in ordering divestiture of the acquisition of one natural gas company by another, has expressly recognized the threat to competition posed by the elimination of competition "in the natural gas field." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 661-62 (1964). Furthermore, because "the proper balance between competition and regulation has proven difficult to establish," the American Bar Association Section of Antitrust Law Task Force recently urged the Administration to undertake "vigorous antitrust scrutiny" under Section 2 and be "particularly sensitive to competitive conditions in the newly deregulated industries." ABA Report on the Antitrust Division of the Department of Justice, 58 Antitrust L.J. 747, 767 (1989). In addition to the *amicus* support of the Attorney General of the State of Colorado, the attorneys general of nine states have sent letters to the Department of Justice in recent months encouraging the Department to support review of the decision below. *See, eg.*, App. 1a-3a, *infra.*

Finally, the government suggests that "this case has an unusual (if not unique) factual context" (Br. 20). But—and this, petitioner submits, is critical—the government does not suggest any way in which these supposedly unique facts affect the application of antitrust legal principles. Specifically, the government first states that here "the alleged predatory conduct is the manipulation of rights created by contract between the plaintiff and the defendant." *Id.* There is no rule, however, that immunizes parties from antitrust liability when their exclusionary conduct involves contract manipulation; in fact, the Ninth Circuit has held that such manipulation is sufficient *in itself* to violate Section 2. *Twin City Sportserv., Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1309 (9th Cir.), *cert. denied*, 459 U.S. 1009

(1982). Second, the government states that here "the plaintiff has a share in the entity on which the defendant is alleged to have conferred monopoly power." Br. 20. This fact conceivably might have been relevant to the calculation of *damages* if CIG had profited in some way from NGPL's action (which it did not), but it is entirely and obviously irrelevant to the legal question about the standard for proving attempted monopolization.

In summary, the United States has ignored the Tenth Circuit's opinion in recommending that a concededly important issue not be reviewed. Its reading is indefensible and offers no principled basis for this Court to avoid resolving a fundamental issue of antitrust law. There is no doubt that the Tenth Circuit treated this case as an attempt case, and no doubt that the Ninth Circuit and the Eighth Circuit would have applied a different standard of "dangerous probability of success" and would have affirmed petitioner's antitrust judgment. This Court should take this opportunity to resolve the 25 years of circuit conflict over the standard for attempted monopolization.

II.

The Solicitor General does not defend the clear holding of the Tenth Circuit that preemption in this case is appropriate because FERC's order requires breathing room. Pet. App. 12a. Instead, the government proposes a strained application of the filed rate doctrine, which does not serve as an adequate alternative basis for holding CIG's contract claim preempted and does not even eliminate the conflict among the courts of appeals on this issue. Accordingly, the court should review the Tenth Circuit's analysis on its face and accept the Solicitor General's concession that the court of appeals' implied preemption holding warrants review.

The Solicitor General's filed rate analysis is unassailable as far as it goes. That analysis fully explains why FERC did not intend to allow CIG to enforce the con-

tract's minimum bill provision in the state law claim for simple breach. Preempting a simple breach of contract action is necessary to effect the essential purpose of FERC's order, which was to eliminate the anticompetitive element in these contracts. In this way, purchasers such as NGPL could buy other gas at lower prices and pass the savings on to gas consumers. FERC clearly intended to confer this right to breach the contract upon NGPL and a state law action to recover damages would directly frustrate FERC's order. Thus, under well-settled preemption principles, a simple breach of contract claim would conflict with that order.

But the Solicitor General makes absolutely no effort to explain why FERC also would intend in that same order to preempt a claim that NGPL has acted in bad faith by refusing to purchase low-cost gas available under that contract so that it could purchase more expensive gas for no reason except to harm a competitor. There is no apparent federal interest in immunizing bad faith conduct injuring a competitor that leads to higher gas prices in the wholesale market. Thus, allowing the State of Colorado to enforce its laws protecting that competitor does not conflict with any FERC order.[6]

For this reason, the Solicitor General is ultimately required to take precisely the same position as the Tenth

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[6] The Solicitor General adopts an incredibly wooden analysis of preemption in this context: FERC adopted an order restricting the costs NGPL must pay; this state law contract action allows CIG to recover additional costs; therefore, the state law action must be preempted. But this analysis presumes that any state law action that bears any relation to a "filed rate" is preempted, which is only true under the court of appeals' implied-preemption, breathing-room theory. There is no actual conflict between recovery for bad faith under state law and the filed rate. The recovery is based solely on the filed rate for gas that would have been taken in good faith and nothing in the federal order purports to grant NGPL the "right" to act in bad faith breach. Thus, there is no inconsistency in the obligations imposed upon NGPL and the state law recovery does not interfere with Congress' or the FERC's purposes in eliminating claims for simple breach.

Circuit, which is that there is implied preemption. Thus, the government finds preemption in the fact that in its order FERC "drew no such distinction" between simple and bad faith breach of contract and that the Commission later "declined to alter its ruling." Br. 14, 15. But those are merely different ways of stating what the court of appeals held, viz., that the state law claim can be preempted based on FERC's silence in order to provide the filed rate with "breathing room." Because the United States concedes that petitioner's argument on this point has "considerable force," review by this Court remains clearly warranted.

Even if the Solicitor General's preemption analysis were sound, the issue still would warrant review because of the conflict between the holding of the Tenth Circuit (even under the Solicitor General's theory) and the holding of the Fifth Circuit in *Gulf States Utils. Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). In *Gulf States* the court acknowledged that "[t]he FPA" . . . preempts *some* private causes of action for breach of contract (*id.* at 1471; emphasis added), particularly those "contract" claims in which recovery of damages would require calculation of a *rate* different than set by FERC. Nevertheless, the Fifth Circuit held that a utility's claim for "breach of an independent duty to act in good faith" was not preempted by the Federal Power Act or by the filed rate doctrine. *Id.* at 1469, 1474. The Solicitor General simply does not address the fact that in *Gulf States*—as here—the injured party claimed that "good faith" conduct "would have [affected] the *amount purchased* (not the rate)," and the court therefore ruled that "[t]his claim would not be preempted by the FPA." *Id.* at 1471 (emphasis in original). The Tenth Circuit's holding squarely conflicts with *Gulf States* and nothing the Solicitor General has argued eliminates that conflict.[7]

[7] The Solicitor General quotes from the portion of the *Gulf States* opinion that focuses on claims seeking a different rate and

CONCLUSION

For the reasons set forth above and those stated in the petition and reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 24, 1990

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ignores the relevant portion of the opinion which protects state law claims based on the amount of energy consumed. Because the claim here is that NGPL would have purchased more gas at the filed rate, this is precisely the type of claim the Fifth Circuit approved.

APPENDIX

APPENDIX

STATE OF ILLINOIS
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Neil F. Hartigan
Attorney General

July 20, 1990

James F. Rill, Esq.
Assistant Attorney General
United States Department of Justice
9th and Constitution Ave., N.W.
Washington, D.C. 20530

RE: *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co.*, No. 89-1508, petition for certiorari pending

Dear Mr. Rill:

I have requested the State Attorneys General to join me in writing to you to inform you of my interest in the above-referenced petition for a writ of certiorari, in which the Supreme Court has called for the views of the United States. I understand that you have been asked to make a recommendation to the Solicitor General concerning the proper disposition of the petition. In making that recommendation, I hope that you will take into account my strong interest in the enforcement of Section 2 of the Sherman Act.

In this case, the verdict for plaintiff on the Sherman Act Section 2 attempted monopolization claim was based on proof that the defendant had engaged in "predatory" conduct that had enabled it to increase its market share to 54% while forcing natural gas customers to pay supracompetitive prices. *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co.*, 885 F.2d 683, 692-696 (1989).

The Tenth Circuit reversed the verdict on the ground that the defendant would be unlikely to achieve the 70% to 80% market share the court believed necessary to achieve monopoly status. The court of appeals also held that the verdict was in error because the defendants' ability to charge supracompetitive prices would expire after six years. *Id.*

As you know, the Colorado Attorney General, together with the Public Service Company of Colorado, the City and County of Denver and the City of Colorado Springs, filed an *amicus* brief in support of the petitioner. These *amici* expressed their concern that the decision of the Tenth Circuit under review "undermines the antitrust law's protection against monopolization and supracompetitive pricing." Br. at 2. The decision "undermines *amici*'s interest in promoting the unequivocal policy of competition which is the essence of the Sherman Act." *Id.* at 8. As consumers—and, more important, as parties charged with enforcing the antitrust laws on behalf of consumers in our *parens patriae* role—I share that concern.

Under the decision below, a state attorney general bringing an attempted monopolization claim could not sustain a verdict—even with evidence of exclusion of lower-cost competitors and higher prices to consumers—absent proof that the defendant would eventually achieve a 70%-80% market share that could be sustained for more than six years. Such a rule would seem to make it virtually impossible ever to bring a successful attempted monopolization claim.

I strongly believe that this case is appropriate for certiorari. The record is clear and the findings of fact in the lower courts are well-supported by that record. Moreover, as the petition for certiorari demonstrates, the Tenth Circuit's decision creates or exacerbates several conflicts among the circuits on the issues presented.

In sum, the petition raises issues of fundamental importance to states' efforts to achieve sound enforcement of the Sherman Act's prohibition against attempts to monopolize. The patchwork of conflicting rules among and within the circuits impairs our ability to formulate policy and to undertake uniform enforcement decisions. I strongly urge you to take these interests into account when the Department makes its recommendations to the Supreme Court.

Thank you for your attention to this matter.

Sincerely,

NEIL F. HARTIGAN
Attorney General
State of Illinois

cc: Kenneth Starr
Solicitor General of the United States

No. 89-1508

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

ARGUMENT

Urging that the petition in this case be denied, the Solicitor General, on behalf of the United States and FERC, advised the Court that the Tenth Circuit "correctly resolved" both the preemption and antitrust issues "based on the particular record in this case" and that "the decision below does not present any square conflict with another court of appeals decision [and] arises in an unusual factual context not likely to be replicated." SG Br. 11. The Solicitor General further explained that, despite CIG's efforts to recast the decision, the Tenth Circuit's ruling presents "relatively narrow" issues and that this case would be an "unsuitable vehicle" for consideration of the broad questions framed by CIG. *Ibid.* CIG's attempt to escape those conclusions in its Reply

once again ignores the issues that are actually presented by the ruling below.[1]

1. CIG leads with the assertion that the Solicitor General "seriously mischaracterize[d] the court of appeals' opinion[,] . . . [which] did *not* treat the case as one of actual monopoly; rather, it held that petitioner could not prevail on its attempted monopolization claim." Reply to SG Br. 2. CIG is engaged in semantic quibbling, because, as the Solicitor General explained in analyzing CIG's attempted monopoly claim, "The question of probability of success had resolved itself into the question whether success had been achieved." SG Br. 16. CIG's antitrust claim is that Natural allegedly increased the Trailblazer System's market share by exercising its contractual reservation of capacity on CIG's system. That tool, however, had been fully exhausted at the time of trial: Natural had "exercise[d] *all* its rights under the [CIG-Natural] Service Agreement to tie up the *entire* capacity it had reserved." Pet. App. 23a. Consequently, "[t]he necessarily limited scope of Natural's objective leaves no room for speculation about the probability that the Trailblazer System would gain a monopoly." *Ibid.*

As the Solicitor General observed, therefore, CIG could not prevail on its claim of attempted monopolization in this unusual case without demonstrating that the Trailblazer System had already achieved monopoly power. On that question, the Tenth Circuit ruled that CIG had not proved such power. *See* SG Br. 16-18. Indeed, as we have previously explained (*see* Br. in Opp. 22-23), the court could not have drawn any other conclusion. *See also* page 3, *infra*. In any event, the court's ruling that

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[1] We make only a few points in this supplemental brief and otherwise rely on our previous submission and the Solicitor General's brief, which fully answer all of CIG's arguments. In response to CIG's reliance on *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), we note that, in the present case, there is no division of views within the government.

such proof was lacking here plainly does not merit review.

2. CIG's linguistic diversion aside, it remains clear that CIG's antitrust question raises an issue that is not presented by the decision below. Contrary to CIG's claim, the Tenth Circuit did not deny liability while "accept-[ing] without question facts that are themselves sufficient to prove actual monopolization." Reply to SG Br. 3. In particular, the court did not find the "facts" that CIG says were found—namely, that CIG proved that the Trailblazer System had the ability to exclude CIG and to charge supracompetitive prices. *Ibid.* The Solicitor General correctly explained that the court of appeals' opinion contains no such findings (SG Br. 16-17), and it is clear that the opinion *could* not have done so. Neither the court of appeals nor the district court, of course, was the fact-finder; and the jury, which was the sole fact-finder, was not instructed to find, and did not find, any ability to control prices or to exclude competition. Nor, as we have previously explained, did the evidence support, let alone compel, any such finding. Br. in Opp. 22-23; *see also* SG Br. 16-17. Thus, the entire premise of CIG's antitrust challenge in this Court is mistaken: the Tenth Circuit did not have before it, and did not itself manufacture, findings that CIG had proved the elements of monopoly power, and therefore could not have ignored such findings in rejecting CIG's antitrust claim.

3. CIG's challenge to the Solicitor General's views on the preemptive scope of FERC's orders ignores CIG's own petition for certiorari. In that filing, CIG castigated the Tenth Circuit for "refus[ing] to solicit FERC's views on this issue[,]" explaining that "FERC's intent 'can be answered fully and quickly through amicus participation.'" Pet. 16 & n.14 (quoting *Distrigas of Massachusetts Corp. v. Boston Gas Co.*, 693 F.2d 1113, 1118-19 (1st Cir. 1982)). Through the government's *amicus curiae* brief in this Court, FERC has unambiguously

answered the question that CIG itself acknowledges to be dispositive. That CIG does not like FERC's answer provides no basis for further review. In any event, FERC's interpretation of its own orders in this case is correct. *See* SG Br. 11-15.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition for a writ of certiorari should be denied.

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No. 89-1508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF UNION PACIFIC RESOURCES COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Accepting that defendant possessed the power to raise prices to supra-competitive levels and exclude competitors for a period of six years, and that, as a result of its predatory conduct, it conferred a substantial share (54%) of a highly concentrated market on an affiliate, the court of appeals below nevertheless held that, as a matter of law, defendant could not unlawfully attempt to monopolize under Section 2 of the Sherman Act because it could not confer a 70-80% market share on its affiliate and because its ability to exercise monopoly power was not permanent.

Under the circumstances, the questions presented are:

1. Whether, as a matter of law, a party cannot under any circumstances possess monopoly power in a relevant market, unless it has at least a 70% to 80% share of that market.

2. Whether, as a matter of law, there cannot be a dangerous probability that a party will achieve monopoly power in a relevant market, if, for any reason, its share of the market cannot reach 70-80%.

3. Whether, as a matter of law, a party cannot unlawfully attempt to monopolize a relevant market if its ability to raise prices and exclude competitors is not permanent.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF UNION PACIFIC RESOURCES COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Union Pacific Resources Company (U.P. Resources) is a wholly-owned subsidiary of Union Pacific Corporation and is the corporate successor of Champlin Petroleum Company (Champlin). U.P. Resources is, and for many years has been, engaged in the business of the production and sale of natural gas in various states, including the Overthrust region of Wyoming. In order to be

sold, U.P. Resources' Overthrust gas must be transported substantial distances over interstate pipelines to metropolitan areas where it is consumed.

As a producer and seller of gas that must be shipped over pipelines, *amicus* has a direct interest in issues that affect the legal rights of producers, shippers and purchasers of natural gas. In particular, *amicus* is vitally concerned with the ability of any pipeline in a highly concentrated market (characteristic of many natural gas producing regions which are served by only a few pipelines) to exercise market power in a way that precludes the use of low cost means of transportation in favor of high cost means of transportation.

Amicus was directly and substantially injured as a result of anticompetitive acts of respondent Natural Gas Pipeline Company (NGPL) as found by the jury and the District Court below. Natural gas produced by *amicus* (Champlin) was diverted by NGPL from the lower-cost pipeline of petitioner Colorado Interstate Gas Company (CIG) to much higher-cost pipelines in which NGPL had a dominant financial interest.[1]

STATEMENT

Amicus generally agrees with Petitioner's statement. However, it wishes to emphasize that NGPL's exclusionary conduct did, in fact, have an actual and substantial anticompetitive impact on producers and sellers whose natural gas was shipped over the least efficient, highest cost pipeline.

1. During the gas shortage of the 1970's, reserves of natural gas were discovered in southwest Wyoming by

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[1] In addition, as the jury, the District Court and the Court of Appeals found, NGPL tortiously interfered with Champlin's extremely valuable long term contract to supply natural gas to CIG. (*See* Pet. App. 4a, 14a-16a, 31a, 58a-63a.) *Amicus* has notified NGPL of its intention to file suit asserting antitrust and tortious interference claims against NGPL.

amicus and others. Since the volume of this gas far exceeded the amount that could be consumed in the local markets in Utah, Wyoming and Colorado, it had to be transported long distances for interconnection with other pipelines serving major market areas in the midwest and elsewhere.

There were few options for the long distance transportation of this newly discovered gas. One option was by CIG's-pipeline that runs from southern Wyoming through Colorado and south to the Oklahoma-Texas panhandle where it interconnects with other pipelines, including NGPL's trunkline to the Midwest.

In the late 1970s, NGPL proposed the construction of a new pipeline that would directly connect the newly discovered southwest Wyoming gas fields to NGPL's trunkline. This pipeline, in which NGPL held the largest financial and capacity interests, was known as the Trailblazer System. From southwest Wyoming, it ran parallel to CIG's line until Cheyenne where it continued east to connect with NGPL's trunkline at Beatrice, Nebraska. This new line provided an alternative means for the long-distance transportation of Wyoming natural gas.[2]

Because the Trailblazer System was a new pipeline, built at a high cost, it had to charge transportation rates that were much higher than those of its competitors, including CIG. Not surprisingly, as demand for natural gas slackened in 1982 and 1983, very little gas flowed over the Trailblazer System.

With its dominant financial interest in Trailblazer imperiled by the system's inability to compete with CIG's

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[2] Although FERC had doubts about the need for this additional pipeline capacity, it approved construction of the Trailblazer System, but with an unusual rate structure in which rates increased with the volume of gas transported. Under this arrangement, parties with financial interests in this system were severely penalized if throughput fell below projections.

lower-cost line, NGPL embarked upon a course of predatory conduct to exclude CIG from competing for long distance transportation of Wyoming natural gas, including that produced by Champlin. Historically, NGPL purchased substantial quantities of gas from CIG under long-term contracts. In July 1983, NGPL abruptly refused to purchase gas from CIG.[3] As a result of NGPL's actions, CIG shut-in and refused to buy any gas from Champlin in breach of its contractual obligations. NGPL then purchased the gas directly from Champlin at a lower price so that it could transport it on the higher cost Trailblazer System.

Under the terms of the service agreement in effect between CIG and NGPL, however, CIG was obligated to continue to reserve space in its pipeline for the full volume of gas subject to its agreement for NGPL. As a result, CIG was unable to use this capacity to provide firm transportation service for other customers. To make sure that CIG was prevented from transporting gas for other customers, NGPL nominated but refused to buy large volumes of gas from CIG, tying up transportation capacity on CIG's line. NGPL even increased its nominations without purchasing any gas. At other times, NGPL made periodic gas purchases from CIG that were timed in a fashion to interfere with CIG's efforts to transport gas for others on an interruptible basis.

2. CIG sued NGPL, alleging, among other things, that NGPL attempted to monopolize the market for the long distance transportation of natural gas from Wyoming. After an eight week trial, the jury found that NGPL had, in fact, violated Section 2 of the Sherman Act by attempting to monopolize the long-distance transportation of natural gas. The district court denied NGPL's motion for judgment notwithstanding the verdict and en-

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[3] Although NGPL's stated reason for doing so was that it had a surplus of gas, NGPL proceeded to replace much of the CIG gas with other, higher cost gas.

tered a substantial judgment in favor of CIG on its antitrust claim. Pet. App. at 29a-88a.

3. On appeal, the Tenth Circuit reversed the antitrust judgment on grounds not raised by NGPL. *Id.* at 1a-28a. The court of appeals accepted that NGPL's conduct was "predatory," *id.* at 23a and "reprehensible," *id.* at 19a, and that as a result of this conduct NGPL was able to (i) increase Trailblazer's market share from 41% to 54%, *id.* at 21a, 23a, (ii) impose an enormous increase in the effective price for the transportation of natural gas by requiring it to be shipped over the higher cost Trailblazer System, *id.* at 27a, and (iii) effectively exclude CIG from competing for this business for a period of six years. *Id.*

Nevertheless, the court concluded that this conduct—as well as its impact on buyers, sellers and shippers of natural gas—did not implicate the concerns of the antitrust laws because CIG could not, as a matter of law, establish that there was a dangerous probability that the Trailblazer System would ever achieve monopoly power. *Id.* at 20a. The court based this conclusion on two factors. First, although it recognized that the "Supreme Court has refused to specify a minimal market share necessary to indicate a defendant has monopoly power," the court of appeals held that NGPL lacked the ability to increase Trailblazer's market share to the 70-80% minimum which the court found to be necessary, as a matter of law, to confer monopoly power. *Id.* at 21a & n.18.

Second, the court of appeals concluded that Section 2 of the Sherman Act was concerned only with the permanent or persistent exercise of monopoly power. *Id.* at 25a and 26a, n.22. Since Trailblazer's ability to exercise market power was limited to the six year period during which NGPL had a contractual right to tie-up CIG's capacity, the Court found that Section 2 did not apply to NGPL's "reprehensible" conduct. *Id.* at 27a.

REASONS WHY THE PETITION SHOULD BE GRANTED

The petition should be granted and this Court should review the decision below. The holding of the court of appeals conflicts with decisions of this Court and those of other courts of appeal on the critical issue of the extent to which unilateral conduct by a single firm with significant market share—and demonstrated monopoly power—is prohibited by Section 2 of the Sherman Act. By adopting an inflexible mathematical standard for the minimum share required by Section 2 (70-80%), the decision of the court of appeals adds to the existing confusion among the lower courts which, in the absence of guidance from this Court, have developed a variety of inconsistent tests for determining when monopoly power may be found to exist. Not surprisingly, these differing tests have led to widely conflicting rulings. This case presents an ideal opportunity for the Court to resolve these conflicts and to provide much needed direction to the lower courts.

1. The Tenth Circuit's requirement of a minimum market share necessary to attain monopoly power (70-80%) misconceives the role of market shares in determining monopoly power for purposes of Section 2. Section 2 condemns the unlawful possession, acquisition or attempted acquisition of monopoly power. Monopoly power is "the power to control prices or exclude competition." *United States v. E.I. duPont deNemours & Co.*, 351 U.S. 377, 391 (1956). The Court has held in plain terms that monopoly power can be proven in one of two ways: (i) as in the case below, by direct evidence of the actual exercise of control over prices or the actual exclusion of competitors, *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *see also FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986) (in Section 1 case, proof of anticompetitive effects eliminates need to demonstrate market share to show adverse

effect on competition), or, (ii) in the absence of such direct evidence, by indirect or circumstantial evidence of the defendant's ability to control price and exclude competitors.

By holding that a certain minimum market share must be established to prove monopoly power, the court of appeals ignored the fundamental fact that Section 2 prohibits the exercise of monopoly power and not simply the possession of a specified market share. It also rendered irrelevant the best and most direct evidence of monopoly power, *viz.*, the actual exercise of the power to exclude competitors and raise prices. Unfortunately, the Tenth Circuit is not alone in this error as most courts of appeal have utilized minimum market share criteria of one type or another. *See* pp. 8-9, *infra.*

Reliance on minimum market share tests for proof of monopoly power produces the sort of anomalous results seen below: a company that was "helpless to compete" on the basis of price and quality but that was able to exclude competitors from the market for a six year period during which it imposed supra-competitive prices was deemed legally incapable of attempting to monopolize because its market share could never reach the minimum level the lower court thought necessary to demonstrate monopoly power.

The Court should grant the petition to affirm that Section 2 condemns any wrongful exercise of "monopoly power" and not just the exercise of such power by a defendant with a certain share of the market.

2. In circumstances where there is no conclusive direct evidence of the actual exercise of monopoly power, lower courts need guidance from the Court on the significance to attach to market shares in determining whether a defendant possesses, or is capable of possessing, monopoly power.

Recognizing that market share is only one factor to be considered in assessing market power, the Court has long condemned mechanical reliance on market share tests for determining market power.

> We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of a percentage command of a market varies with the setting in which that factor is placed.

United States v. Columbia Steel Co., 334 U.S. 495, 527-28 (1948) (footnote omitted). *See also Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986) ("[m]arket share is just a way of estimating power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them."); *In re General Foods Corp.*, 103 F.T.C. 204, 357 (1984) (use of market share as a gauge of market power "has been increasingly questioned on both theoretical and empirical grounds"). The panel's arbitrary 70-80% minimum market share threshold for proof of monopoly power constitutes just the sort of "[b]lind reliance upon market share, divorced from commercial reality" that may "give a misleading picture of a firm's actual ability to control prices or exclude competition," *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), that this Court has criticized.

The lower courts and federal antitrust enforcement agencies have encountered great difficulty in determining the significance of market share as an indication of monopoly power. The decision below adds to and deepens the existing confusion. In the Tenth Circuit, a finding of monopoly power now requires proof of a 70-80% market share. In the Seventh Circuit, a 60% market share is required, *Holleb & Co. v. Produce Terminal Cold Storage*

Co., 532 F.2d 29, 33 (7th Cir. 1976). In both the Second and Ninth Circuits, less than a 50% share may suffice, *Hayden Publishing Co. v. Cox Broadcasting Corp.*, 730 F.2d 64, 68-69 & n.7 (2d Cir. 1984); *Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 130 (2d Cir.) (instruction precluding monopoly power with market share less than 50% is erroneous), *cert. denied*, 454 U.S. 968 (1981); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975) (upholding jury verdict of monopolization with market shares as lower in 45%), *cert. denied*, 425 U.S. 959 (1976), while in the Fifth Circuit, a 50% market share may or may not suffice. *Compare Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, n.2 (5th Cir. 1969); *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1352 & n.18, 1356-57 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1989) *with Yoder Bros. Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1367 n.14 (5th Cir. 1976) (no "rigid rule" that firm with less than 50% market share lacks monopoly power), *cert. denied*, 429 U.S. 1094 (1977). Still other courts have concluded that, under the appropriate circumstances, firms may possess monopoly power with as little as 25% of the market, *see Energex Lighting Industries v. North American Phillips Lighting Corp.*, 656 F. Supp. 914, 921 (S.D.N.Y. 1987), while the Department of Justice has indicated that a firm with 35% of the market may be able to exercise anticompetitive market power. U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations, § 3.2 ("Monopolization") at 9 & n.52 (November 10, 1988) ("In general, the Department will not be concerned with unilateral conduct if a firm has a market share of less than 35%.").

The Supreme Court should review the holding below to clarify the difficult but essential question of the proper

role of market share analysis in determining market power. As others have noted:

> In challenges to unilateral behavior, the defendant's market share can indicate its market power. However, the connection between market share and market power is far from clear.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 518.3 at 448 (1989 Supp.).

3. The Tenth Circuit's holding that Section 2 is concerned only with the exercise of permanent or persistent monopoly power also deserves review by this Court. The panel's decision that the antitrust laws do not care about the exercise of monopoly power—no matter how predatory, or long lived—so long as "the market will return to the status quo at a predetermined date," App. at 27a & n. 24, is at odds with the fundamental purpose of Section 2.

There is no basis in logic or in either the text or the legislative history of the Sherman Act to confine the broad prohibition of Section 2 to the permanent exercise of monopoly power. When, as here, a party has the power to exclude competitors and impose supracompetitive prices, Section 2 applies, regardless of the duration of that power, just as it does when a monopolist engages in predatory conduct that can only delay but not ultimately exclude entry by competitors[4] or when a patent owner insists on payment of royalties for any period beyond the terms of the patent. *Brulotte v. Thys Co.*, 379 U.S. 29, 31 (1964).

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[4] *See e.g.* U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations, Case 13 (November 10, 1988) (anticompetitive use of Section 337 of 1930 Tariff Act by monopolistic producer to exclude (temporarily) entry by foreign competitor by sham filing of petition with U.S. International Trade Commission).

The panel's decision that Section 2 is concerned only with the permanent exercise of monopoly power is also flatly inconsistent with the decisions of other courts of appeal which have recognized that monopoly power is prohibited by Section 2 whenever it exists. *See e.g. Dimmitt Agri Indus. v. CPC Int'l, Inc.*, 679 F.2d 516, 531, 533-34 (5th Cir. 1982) (sufficient evidence of attempt to monopolize even though competition limited defendant's long-term control over prices), *cert. denied*, 460 U.S. 1082 (1983); *Peto v. Howell*, 101 F.2d 353, 356 (7th Cir. 1939) ("it is not to be conceived that a monopoly . . . for one day is any less a violation of the law than a monopoly . . . for thirty days or for a year.").

While there may be instances in which a party may legitimately acquire significant but temporary market power, considerable confusion exists among the lower courts and the antitrust enforcement agencies over the duration of market power that is the proper concern of the antitrust laws. The court of appeals below found that a six year period of unbridled market power was simply "transitory" and of no concern to the antitrust laws,[5] App. at 28a, while other courts have found that the exercise of such power for as little as one day or one month was prohibited. *Supra.* The FTC has concluded that insulation from competitive entry for 5 years permits the exercise of impermissible market power, *In re Weyerhauser Co.*, [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,315 at 23,382 (1985) (merger), while the Department of Justice relies on a two-year time period in determining whether new entry is likely to erode the market power of a dominant firm. *See* U.S.

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[5] In contrast, the Justice Department regards a one-year price increase as "non-transitory" for purposes of defining a relevant market in which a hypothetical monopolist may exercise market power by raising prices without causing a shift in consumer demand. U.S. Department of Justice, Revised Merger Guidelines § 2.12 (June 14, 1984).

Department of Justice, Revised Merger Guidelines § 3.3 (June 14, 1984).

The Court should review the decision below to resolve the important issue of whether, and under what circumstances, the unilateral exercise of market power that is not permanent is subject to the prohibition of Section 2 of the Sherman Act. As one commentator has stated in connection with the measurement of market power, "[a]ntitrust law needs to decide what time period concerns it." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 518.3 at 451 (1989 Supp.).

CONCLUSION

For the reasons stated, the Court should grant the petition and review the decision of the court of appeals.

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BRIEF OF PUBLIC SERVICE COMPANY OF COLORADO, THE COLORADO ATTORNEY GENERAL, CITY AND COUNTY OF DENVER AND CITY OF COLORADO SPRINGS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the determination that the Federal Energy Regulatory Commission has preempted state law remedies for breach of a filed contract justifies the presumption that state law remedies for breach of the independent duty of good faith and fair dealing also must be preempted in order to provide "breathing room" for FERC's exclusive jurisdiction over the contract claim.

2. Whether conduct specifically intended to monopolize, which actually results in the charging of supracompetitive prices to consumers, cannot as a matter of law support a jury verdict of attempted monopolization under Section 2 of the Sherman Act because there are limits both on the defendant's ability to increase market share and its ability to continue to exercise market power for more than six years.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1508

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA
and NGPL-TRAILBLAZER, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF PUBLIC SERVICE COMPANY OF COLORADO, THE COLORADO ATTORNEY GENERAL, CITY AND COUNTY OF DENVER AND CITY OF COLORADO SPRINGS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

Public Service Company of Colorado ("PSC") is an operating public utility corporation engaged in, among other things, the purchase, distribution and sale of natural gas at retail to domestic, commercial and industrial customers in northern, central and western Colorado. The City and County of Denver ("Denver") is a municipal corporation in Colorado which is one of the largest consumers of natural gas in the State of Colorado. The Colorado Attorney General functions as an advocate for the interests of consumers in various

regulatory proceedings. The City of Colorado Springs ("Colorado Springs") is a municipality that owns and operates a public utility engaged in the purchase, distribution and sale of natural gas at retail to over 100,000 domestic, commercial and industrial consumers in the City of Colorado Springs and in surrounding El Paso County, Colorado.

Amici share a vital interest in issues that affect the relative legal rights of producers, pipelines and consumers of natural gas. The decision below has important implications for the natural gas industry, both in terms of standards of fair competition and the interplay of state and federal regulatory authority. As public utilities and purchasers of natural gas, *amici* PSC, Denver and Colorado Springs are concerned that the decision below undermines the antitrust law's protections against monopolization and supracompetitive pricing. In sum, because the decision below will have a substantial impact —both doctrinally and practically—all *amici* share an interest in having this Court address the important questions of federal law raised by the petition.

STATEMENT

1. *Amici* agree with the statement presented to the Court by petitioner, Colorado Interstate Gas Company ("CIG"), but wish to emphasize certain facts. Both parties to this case are natural gas pipeline companies engaged in the transportation and sale of natural gas in interstate commerce. See Natural Gas Act of 1938, 15 U.S.C. § 717a(6). Petitioner CIG's principal pipeline runs from south Wyoming, through Colorado, and into the Oklahoma panhandle, where it connects with other major trunk lines that carry the gas to the Midwest and elsewhere. Respondent Natural Gas Pipe Line Company of America ("NGPL") owns one of the pipelines that connects with CIG's pipeline in Oklahoma. Under the contract at issue here (the "Service Agreement"), NGPL nominated and purchased quantities of natural gas from

CIG, which transported the gas to Oklahoma where it is delivered to NGPL. Under the terms of the Service Agreement, CIG was required to reserve transportation capacity for all volumes of gas nominated by NGPL and to deliver all volumes of gas actually purchased by NGPL each day. NGPL, in turn, was required to purchase a minimum amount of gas, both on an annual and daily basis, and was required to pay a "minimum bill" if it failed to take the specified annual amount.

In 1982, construction was completed on the Trailblazer System, a $500 million natural gas pipeline system designed to transport natural gas out of south Wyoming. The Trailblazer System, which is owned in large part and economically controlled by NGPL, runs parallel to CIG's pipeline in Wyoming and intersects NGPL's pipeline in Nebraska. Because the Trailblazer System was a new pipeline, built at relatively high cost, it was forced to charge significantly higher transportation rates (20-40%) than those of other established pipelines—including CIG's competing pipeline.

Beginning in July 1983, NGPL embarked on a course of predatory conduct that led to the jury verdict in this case. The jury found that NGPL manipulated the Service Agreement with CIG in bad faith, as a means to exclude CIG from the market for transportation of Wyoming natural gas, thereby forcing customers to use the higher-priced Trailblazer System. NGPL accomplished this by selectively refusing, in bad faith, to purchase gas from CIG. Because CIG nevertheless was obligated to reserve capacity for NGPL's purchases, CIG was unable to assure "firm" transportation service to alternative purchasers. NGPL reinforced and exacerbated this intentional "tie-up" of CIG capacity by making occasional purchases of gas that were timed to interfere with CIG attempts to provide transportation for other customers and by nominating and then refusing to purchase large volumes of gas.

When NGPL's bad faith conduct forced CIG to release its rights to purchase gas from several suppliers, including its largest supplier, Champlin Petroleum, NGPL stepped in to purchase that gas directly from Champlin for transportation on the Trailblazer system. Many of CIG's customers whose transportation services were disrupted by NGPL's well-timed resumption of purchases also abandoned CIG for the Trailblazer System. Trailblazer's share of the market for transportation of Wyoming natural gas thus rose from 41% to 54% while CIG's fell from 23% to 10%.

Most important, NGPL's ability to manipulate the transportation market through the service agreement had significant detrimental effects on competition:

> Competition was injured by the exclusion of a low-cost competitor from the market. CIG's exclusion resulted in higher prices to producers, shippers, and consumers of natural gas.

Pet. App., 40a-41a. After an eight week trial, the jury returned a verdict against NGPL on a claim that it had attempted to monopolize transportation of Wyoming natural gas in violation of Section 2 of the Sherman Act and on a claim that it had violated the common law implied contractual duty of good faith and fair dealing.[1] The trial court denied NGPL's motion for judgment notwithstanding the verdict.

2. On appeal, the Tenth Circuit reversed. With respect to the claim for breach of the common law duty of good faith and fair dealing, the court of appeals noted that orders of the Federal Energy Regulatory Commis-

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[1] The jury also returned verdicts for CIG on two other claims. The jury's verdict for CIG on a tort claim for intentional interference with contractual relations, which related to the Champlin Petroleum contract, was affirmed by the Tenth Circuit. The verdict for CIG on a breach of contract claim was reversed on appeal and is not at issue here.

sion ("FERC") had established the Service Agreement, as modified by the FERC, as the filed rate for natural gas delivered pursuant to that agreement. Under the agreement, CIG collected "only fixed costs for unpurchased gas" and a higher rate for gas which actually was purchased. Pet. App., 7a. Although the claim for "bad faith" did not seek to modify the rate available pursuant to the Service Agreement, NGPL argued that awarding damages for NGPL's bad faith failure to purchase gas would allow state law to impinge upon FERC's exclusive regulatory authority.

CIG argued that the damage award based on NGPL's bad faith refusal to take gas did not conflict with FERC's tariff rulings and was not intended by FERC to be preempted by the filed rate under the contract. Pet. App., 11a.[2] The court noted that "[i]n this case, FERC was not explicitly confronted with the question of whether [NGPL's] motive for not purchasing gas would be relevant . . .," *Id.* at 11a n.9, and stated that it found CIG's argument to be "forceful." *Id.* at 11a. Nevertheless, the court decided that it could not ignore "the Supreme Court's vigorous effort to insure agency action is not blunted by state regulation." *Id.* at 12a.

According to the Tenth Circuit, FERC's right to establish filed rates "must have room to breathe." Pet. App., 12a. Thus, "limiting the scope of the FERC developed remedy for failure to purchase gas" to those actions that actually conflicted with the FERC tariff failed to give adequate deference to FERC responsibility. *Id.* In addition, the court inferred that FERC intended the preemption of a state common law claim to turn on whether

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[2] It is important to note that damages pursuant to a claim for "bad faith" failure to purchase are measured by determining what volume of gas would have been purchased had the defendant acted in good faith. Damages can then be computed pursuant to the filed rate and do not require the court or jury to set damages with reference to any rate not approved by FERC.

the state claim could be classified as a "tort" claim or a "contract" claim:

> Actions based upon tort were not meant to be pre-empted by FERC's modification of the contract, while actions based upon breach of contract were. Any other distinction would impermissibly undermine the effectiveness of FERC orders.

Id. at 14a. Because the court found that the "bad faith" claim should be characterized as a form of "contract" action, and that "FERC intended to draw the . . . line" between contract and tort claims, the verdict for CIG was reversed. *Id.*

The Tenth Circuit also reversed the verdict for CIG on the Section 2 claim which was based on CIG's allegation that NGPL's conduct was part of a scheme designed to provide the Trailblazer System with a monopoly in the long distance gas transportation market. The court acknowledged that NGPL had engaged in "predatory" conduct that resulted in the exclusion of a low-cost competitor and enabled the Trailblazer System to expand its market share from 41% to 54% while charging supra-competitive prices. Nevertheless, the court held that such a showing was insufficient, in two respects, to support a Section 2 violation.

First, the court held that the likelihood of successful monopolization is "evaluated by examining the defendant's share of the relevant market." Pet. App., 21a. An antitrust plaintiff "must show that there was a dangerous probability that the defendant's conduct would propel it from a non-monopolistic share of the market to a share that would be large enough to constitute a monopoly . . . ." *Id.* Although the court stated that the "Supreme Court has refused to specify a minimum market share necessary to indicate a defendant has monopoly power," it noted that lower courts "generally require a minimum market share of between 70% and 80%." *Id.* at 21a n.18. Ac-

cordingly, the Tenth Circuit concluded that proof of a market share of 54% was insufficient to demonstrate a "dangerous probability of successful monopolization" where the circumstances "presented no danger that Natural could do anything more than shift 13% of the market to the Trailblazer System." *Id.* at 22a-23a. Despite the evidence of specific intent and actual market power, the court concluded that, given the "limited scope" of Natural's ability to shift market share to the Trailblazer System, there "was simply no reasonable chance . . . that Natural . . . could imbue the Trailblazer System with sufficient market share to be a monopolist." *Id.* at 23a-24a.

Second, the Tenth Circuit held that even if monopoly power actually were conferred, "Trailblazer System's ability to charge supracompetitive prices could last only as long as Natural had the contractual right to tie up CIG's pipeline capacity." Pet. App., 27a. This right was "strictly limited by the duration of the Service Agreement" which would expire, by its own terms, after six years. *Id.* According to the court, the exercise of "market power must be *persistent* to make a firm a monopolist for purposes of the antitrust laws." *Id.* at 26a n.22. If, on the other hand,

> the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolization offense.

Id. at 25a. Thus, because Trailblazer's exercise of market power would, at most "have a transitory [*i.e.*, six year] impact on the marketplace," the court held that the evidence was insufficient to support the jury's conclusion that there was "a dangerous probability of successful monopolization." *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

The holding that the predatory conduct of NGPL (pet. app., 19a), which resulted both in injury to petitioner and in supracompetitive prices for natural gas, is not remediable under the antitrust laws or state common law will have a significant and adverse impact in the natural gas marketplace. The Tenth Circuit's decision that state law claims for breach of the implied duty of good faith are preempted by FERC regulation conflicts with several decisions of the Fifth Circuit, with the decisions of FERC and with this Court's teaching that preemption claims are not to be "lightly infer[red]," *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 491 (1987), particularly where the inference is drawn from an agency regulation instead of an act of Congress. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716-17 (1985).

Moreover, the holding concerning the attempted monopolization claim reflects a fundamental misunderstanding of the role of market share analysis in proving a dangerous probability of success in attempted monopolization and is inconsistent with basic principles that have been established both in this Court and in other courts of appeals. *Cf. Federal Trade Comm'n* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (proof of actual anticompetitive effects obviates need for detailed market share analysis). The decision also undermines *amici*'s interest in promoting the unequivocal policy of competition which is the essence of the Sherman Act. See *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). Because of the importance of these issues to purchasers and consumers of natural gas, and indeed to the natural gas industry as a whole, this Court should grant the petition and provide guidance on these issues of vital importance.

I.

The Tenth Circuit's holding that FERC's intent to preempt state law claims for breach of the implied covenant of good faith should be *inferred* from the fact that FERC had approved the rates established by contract is inconsistent with established FERC preemption doctrine. For example, in *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987), the Fifth Circuit upheld the district court's denial of a public utility's motion to dismiss certain state law claims brought by a purchaser of power on the ground that those claims were preempted by FERC regulation under the Federal Power Act ("FPA"), 16 U.S.C. § 824, *et seq.*[3] Although the court recognized that the "filed rate doctrine" precluded any attempt to modify the FERC-approved purchase contracts, 824 F.2d at 1470-1471 (citing *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Arkla*, 453 U.S. 571), it held that certain state law claims related to the contract—including a claim based on breach of the "independent duty to act in good faith" (824 F.2d at 1469)—were not preempted. *Id.*

The court explained that the plaintiff "might be able to show that good faith negotiations would have reduced the *amount purchased* (not the rate) under the [contract]," 824 F.2d at 1471. Such a claim—which is indistinguishable from the claim that NGPL acting in good faith "would have [increased] the *amount purchased* (not the rate) under the [contract]"—"would not be preempted" by FERC regulation of the rate. *Id.* Thus, according to the Fifth Circuit, preemption based on

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[3] Because the FPA and the Natural Gas Act "are in all material respects substantially identical," *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956), this Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co.* v. *Hall* ("*Arkla*"), 453 U.S. 571, 577 n.7 (1981).

FERC approval of contract rates only precludes state law challenges to the rates themselves and not claims based on wrongful conduct such as bad faith, fraud or deceptive trade practices.[4] See *International Paper Co.* v. *FPC*, 476 F.2d 121, 125 (5th Cir. 1973) (FERC approved tariff does not constitute complete defense to all state law contract actions).[5]

The Fifth Circuit's treatment of the preemption issue—which rejects the preemption by "inference" approach of the Tenth Circuit—is entirely consistent with the regulatory preemption doctrine of this Court. There is no question that state law may be preempted by agency regulation as well as by congressional statute (*Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355 (1986); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 698-700 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153-54 (1982)), but the applicable

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[4] Unlike the Tenth Circuit, which rejected petitioner's claim for breach of the implied covenant of good faith on the ground that any remedy under that claim might "permit circumvention of FERC authority" through state law, the Fifth Circuit properly rejected the notion that preemption analysis requires the courts to provide "FERC's remedy . . . [with] room to breathe." Pet. App., 12a. The Fifth Circuit held that a claim under state law to set aside the filed contracts on grounds of fraud or unconscionability would not be preempted—despite the fact that "by setting aside the contracts, the district court would affect [FERC's] filed rates by eliminating them." 824 F.2d at 1472 n.9.

[5] In a related context, the Fifth Circuit, in *United Gas Pipe Line Co.* v. *FERC*, 824 F.2d 417 (5th Cir. 1987), upheld FERC orders that had approved tariffs providing that a seller of natural gas, United, was

> not liable for contract damages arising from deliveries of natural gas curtailed in compliance with a filed curtailment plan unless United, through negligence, bad faith, fault, or willful misconduct, caused the need for curtailments.

824 F.2d at 420. The court rejected United's argument that failure to preclude adjudication in the courts of all state law claims was necessary to achieve uniform federal standards. *Id.* at 426.

standards for implied regulatory preemption are much more stringent. *Hillsborough County*, 471 U.S. at 716-17.[6]

Where an agency—as opposed to Congress—has not expressly exercised its preemptive authority, federal courts should be extremely wary of implying preemptive intent from agency silence. *Hillsborough County*, 471 U.S. at 721. Thus, a court should not find agency intent to preempt the field absent an *explicit* statement of agency intent to do so. See *Fidelity Federal*, 458 U.S. at 154; *Crisp*, 467 U.S. at 705; see also Heineman & Phillips, *Federal Preemption: A Comment on Regulatory Preemption After Hillsborough County*, 18 Urb. Lawyer 589, 601-05 (1986). Nor should a court find that state law is invalidated by a conflict with federal regulation, absent a direct and irreconcilable conflict with federal standards. See *Fidelity Federal*, 458 U.S. at 153. Any ambiguity in the law or regulation which might be construed as placing limits on state governmental prerogatives should be construed in the state's favor. See *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963); *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 127 (1973).

The Tenth Circuit's finding of "implied" preemption by FERC is flatly contrary to these basic principles of agency preemption. The court of appeals did not find any direct conflict between FERC regulation of the contract rate and the state law claim. Nor did the court find any express statement of FERC's intent to preempt such claims. Instead, it relied on its own interpretation of the inferences to be drawn from FERC

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[6] Even where the preemption claim is based directly on an act of Congress, preemption analysis "starts with the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981).

regulation and it concluded that FERC—if presented with the question—would "intend[] to draw [a] line" between actions based on contract and actions based on tort so that its rate regulation would "have room to breathe." Pet. App., 14a. The error in the Tenth Circuit's mode of preemption analysis is underscored by the fact that its "inferences" led the court to a demonstrably incorrect conclusion: FERC does not believe that permitting bad faith claims "would impermissibly undermine the effectiveness of FERC orders" (*id.*), and in fact, FERC consistently has *disclaimed* any intent to preempt state common law claims "involving negligence, bad faith or wrongful conduct." [7]

Because FERC has held that claims that natural gas companies "have not acted in good faith" are not within its jurisdiction, *Southern Company Services, Inc.*, 37 FERC ¶ 61,256 at 61,652 (Dec. 15, 1986), the decision below may leave parties injured by bad faith conduct without any remedy. More generally, the Tenth Circuit's preemption analysis would lead to wholesale preemption of common law claims in the natural gas industry and in other highly regulated businesses. The flat conflict with this Court's decision, with the Fifth Circuit's decisions on point and even with the relevant FERC deci-

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[7] *United Gas Pipe Line Co.*, 4 FERC ¶ 61,151 at 61,351 (August 9, 1978) (in cases involving claims such as bad faith, FERC "has no power to adjudicate contract liability, and . . . such liability must be determined by the courts"); see *United Gas Pipe Line Co.*, 49 FERC ¶ 61,096 at 61,443 & nn. 71-72 (Oct. 27, 1989) (FERC curtailment order limits liability in the "absence of negligence, bad faith, fault or willful misconduct"); *Transcontinental Gas Pipeline Corp.*, 35 FERC ¶ 61,340 at 61,783 (June 16, 1986) ("recovery of damages for breach of contract" is preempted by FERC orders "unless there is a showing of negligence or misfeasance"); *United Gas Pipe Line Co.*, 49 FPC 1211, 1221 (1973) (if pipeline is "guilty of bad faith, or was improvident or negligent, damages for breach of contract could be assessed [but] this is not a determination for this Commission, but properly should be resolved by a U.S. District Court").

sions make it clear that this Court should not allow the Tenth Circuit's cavalier treatment of this important federalism doctrine to go unreviewed. Given the *amici*'s interest, as a matter of federalism, in avoiding unnecessary federal nullification of state authority, see *Hillsborough County*, 471 U.S. at 721; *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), and the practical importance of preserving such claims, *amici* strongly urge the Court to review the decision of the Tenth Circuit.

II.

The Tenth Circuit's holding with respect to the antitrust claims expressly states the premise for the court's ruling as follows:

> unfair business conduct implicates the attempt provision of the antitrust laws only if that conduct threatens to create a monopoly.

Pet. App., 19a. *Amici* agree that "routine" claims of unfair competition do not give rise to remedies under the antitrust laws but *amici* strenuously object to the court of appeals' conclusion that the conduct at issue here was nothing more than a "business tort" because there was no "dangerous probability" that Trailblazer System ever could achieve monopoly power in the relevant market. The court's analysis of the "dangerous probability" element of an attempted monopolization claim under Section 2 gives rise to conflicts among the courts of appeals on an important and recurring question of federal law.

The Tenth Circuit held that proof of a market share of 54% was insufficient to demonstrate a "dangerous probability of successful monopolization" because there "was simply no reasonable chance . . . that Natural . . . could imbue the Trailblazer System with sufficient market share to be a monopolist." Pet. App. 23a-24a. According to the court, a "minimum market share of between 70% and 80%" would be required to "indicate that a defendant has monopoly power." *Id.* at 21a n.18.

This holding flatly conflicts with decisions in other circuits that have recognized that market shares of approximately 50%—or even less—are sufficient to create a jury issue on a Section 2 claim of attempted monopolization. See *Hayden Publishing Co.* v. *Cox Broadcasting Co.*, 730 F.2d 64, 68-69 & n.7 (2d Cir. 1984) (monopoly power may exist despite market share less than 50%); *Kelco Disposal, Inc.* v. *Browning-Ferris Industries*, 845 F.2d 404, 409 (2d Cir. 1988) (55%), *aff'd*, 109 S.Ct. 2909 (1989); *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 452 F.2d 579, 598-99 (7th Cir. 1971) (33%), *cert. denied*, 405 U.S. 1066 (1972); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1301 (9th Cir.) (24%), *cert. denied*, 459 U.S. 1009 (1982).[8] The Tenth Circuit's "mathematical" approach to market power ignores what other courts have recognized—*i.e.*, that market share must be viewed in conjunction with evidence of market structure, barriers to entry and defendant's actual power over price. See *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). Moreover, other courts have expressly recognized that an undue focus on market share, at the expense of other considerations, improperly blurs the line between attempted monopoly and actual monopoly power. *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964).

The Tenth Circuit's holding also is contrary to the basic principle that " 'proof of actual detrimental [competi-

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[8] As one antitrust commentator has noted, "[t]he circuits are in wide disarray on the market share requirements that will support the offense" of attempted monopolization. See H. Hovenkamp, *Economics and Federal Antitrust Law* 168 n.2 (1985) (citing Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Requisite to a Prima Facie Case*, 73 Colum.L.Rev. 1451, 1473-75 (1973); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 835c (1978)).

tive] effects . . . can obviate the need for inquiry into market power, which is but a "surrogate for detrimental effects." . . .' " *Federal Trade Comm'n* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 429 (1986)). The Tenth Circuit's decision reflects an attempt to create a formula pursuant to which the risk of monopoly could be measured with precision, but such measurement may be misleading. More important, where—as here—there is evidence of actual anticompetitive effects sufficient to persuade a jury, resort to such a surrogate is unnecessary. See *supra*, 3-4, 6-7.

The court's willingness to tolerate anticompetitive effects—including supracompetitive pricing—for six years is inconsistent with sound antitrust policy and with the holdings of other courts of appeals. See *Peto* v. *Howell*, 101 F.2d 353, 356 (7th Cir. 1939) ("it is not to be conceived that a monopoly . . . for one day is any less a violation of the law than a monopoly . . . for thirty days or for a year"); *Dimmitt Agri Industries* v. *CPC Int'l, Inc.*, 679 F.2d 516, 533-34 (5th Cir. 1982) (attempted monopoly claim permitted despite constraints on defendant's market share), *cert. denied*, 460 U.S. 1082 (1983); see U.S. Dept. of Justice Merger Guidelines § 3.3, 49 Fed. Reg. 26,823, 26,832 (1984) (merger that permits two year price increase should be challenged). Given the existing disarray among the circuits over the standards for attempted monopolization, see Petition for a Writ of Certiorari, No. 89-1508; *supra*, 14 & n.8, these additional conflicts emphasize the need for this Court to review this decision as a suitable vehicle for bringing some needed guidance to the proper interpretation of Section 2 of the Sherman Act.

The decision of the Tenth Circuit reflects a disturbing undertone of skepticism concerning efforts to turn claims of unfair competition, or "business torts," into claims of attempted monopolization under Section 2. *Amici* recog-

nize that failure to draw the appropriate line between such claims could lead to application of standards of attempted monopoly that would be overinclusive, and thereby deter efficient conduct. See H. Hovencamp, *Economics and Federal Antitrust Law*, at 166-167. But where—as here—"a market is already highly concentrated and has a dominant firm with substantial market power, then the cost of overdeterrence is relatively low, while the cost of underdeterrence is high." *Id.* at 167. Respondent's conduct, which essentially closed off options in the marketplace (*i.e.*, to transport Wyoming gas via petitioner's pipeline) and thereby restricted availability while increasing price, is at the core of what the antitrust laws were enacted to prohibit. See R. Givens, *Antitrust: An Economic Approach* § 2.01, at 2-2 (1989). The adoption by the Tenth Circuit of standards under Section 2 that shield such "reprehensible" conduct (Pet. App., 19a) from antitrust scrutiny in a highly concentrated market should not be left unreviewed by this Court.

In sum, the petition presents important questions regarding the appropriate standards of proof to establish an attempt to violate Section 2 of the Sherman Act, particularly the proof of market power necessary to establish a "dangerous probability" of successful monopolization. Because the Tenth Circuit's ruling threatens to undermine the protections of the antitrust laws for *amici* and others and because it conflicts with basic antitrust principles and holdings of this Court and other courts of appeals, this Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 25, 1990

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RECEIVED
JUN 29 1990

No. 89-1508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA and
NGPL-TRAILBLAZER, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICUS CURIAE* SUPPORTING PETITIONER AND BRIEF FOR PUBLIC CITIZEN AS *AMICUS CURIAE* SUPPORTING PETITIONER

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Attorneys for Public Citizen

June 1990

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IN THE
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ON PETITION FOR A WRIT OF CERTIORARI
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MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICUS CURIAE* SUPPORTING PETITIONER

Public Citizen hereby seeks leave of the Court to file a brief as *amicus curiae* supporting petitioner's request that certiorari be granted in this case to review the first question presented. The proposed brief, which is printed with this motion, takes no position on the second question.

1. The first question presented here is whether orders of a federal agency which are silent on preemption issues may nonetheless preempt state law. The court of appeals

held that they could, not because the governing federal statute or agency order expressly preempts state laws, not because the state law conflicts with the agency's orders, but because, as the court of appeals put it, the agency orders need "room to breathe" (Pet. App. 12a).

2. Public Citizen is a non-profit, consumer organization located in the District of Columbia with 75,000 members from around the nation. The first question presented is of considerable interest and importance to Public Citizen, which has encountered this sort of preemption issue in other settings, as have Public Citizen attorneys in the course of their representation of other parties.

3. The brief which Public Citizen seeks leave to file will discuss situations outside the area of natural gas regulation where there is also confusion on the part of the lower courts and litigants about when and how a court may properly infer that an agency order preempts state law when the order does not address the preemption issue raised in the suit. This brief will also discuss the special problem posed if agency orders, as distinguished from agency rules, are given preemptive effect by implication. Thus, the brief will furnish the Court with information which has not previously been brought to its attention and which will explain why the first question presented is significant in other areas of the law.

4. Public Citizen acknowledges that under this Court's Rule 37, the filing deadline was 25 April 1990, but we ask the Court to accept this motion and brief at this time for the following reasons.

5. On 14 May 1990, this Court invited the Solicitor General to file a brief expressing the views of the United States. Public Citizen was not aware of this case until

shortly before that date, at which point it was already too late to file a brief. In light of the Court's order, however, respondents will not be prejudiced if Public Citizen's brief is accepted at this time. We are advised that the Solicitor General's brief will not be filed in time for the petition to be considered at any of the remaining conferences scheduled for this month. Thus, since the petition will not be considered until the Court's September conference at the earliest, respondents will have ample time to file a brief answering points made by the Solicitor General, as well as the points made by Public Citizen here.

6. Rex E. Lee, counsel of record for petitioner, has stated that petitioner has no objection to granting this motion. Joel I. Klein, counsel of record for respondents, has stated that respondents object to granting this motion as it is untimely.

For these reasons, Public Citizen respectfully requests that the motion be granted and that the Clerk be directed to accept the brief for filing.

Respectfully submitted,

Cornish F. Hitchcock
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Alan B. Morrison
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(202) 785-3704

Attorneys for Public Citizen

June 1990

IN THE
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COLORADO INTERSTATE GAS COMPANY,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF FOR PUBLIC CITIZEN AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of Public Citizen in this case is set forth in the accompanying motion for leave to file this brief.

REASONS FOR GRANTING THE WRIT

The petition for certiorari demonstrates that a conflict exists between the circuits on the precise preemption

point raised in Question One and that the court of appeals' analysis is inconsistent with this Court's preemption cases. Instead of repeating that discussion, we explain below why the problem raised by this case goes beyond the area of natural gas regulation and why the claim that orders issued by federal agencies implicitly preempt state laws should be rejected, except in those instances where the state law creates such a clear-cut and irreconcilable conflict with the federal rule that it is impossible to comply with both.

1. Under the doctrine of implied preemption, the Court has held, based on an analysis of such factors as the comprehensiveness of a federal regulatory statute, that Congress intended a federal statute to preempt state laws even when no preemptive effect is expressly stated in the statute. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Court has, however, hesitated to infer preemption on the basis of decisions issued by a federal *agency*, particularly when the decision in question is silent on preemption. Thus, in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), the Court rejected a claim that preemption could be implied on the basis of a comprehensive set of federal rules. As the Court observed, "because agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Id.* at 718. Thus, if "an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to

preempt." *Id.* The Court added that it would "seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety." *Id.*

Since *Hillsborough County*, the Court has reaffirmed that if an agency intends to preempt state law, "one would expect to find the expression of this intent in these [federal] regulations." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583 (1987). And in *North Dakota v. United States*, 58 U.S.L.W. 4579 (U.S. 21 May 1990), the Court rejected a claim of preemption by regulation, noting that the rule in question did not "itself purport to pre-empt state laws." *Id.* at 4579 (plurality opinion). In those cases where preemption by regulation has been found, the Court has noted that the rule in question clearly expressed a preemptive intent. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 705 n.10 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuestra*, 458 U.S. 141, 154-59 (1982).

Requiring agencies to state explicitly any preemptive intent is an appropriate means of "prevent[ing] the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kansas*, 109 S. Ct. 1262, 1272 (1989) (footnote omitted). Indeed, the importance of this requirement was articulated prior to *Hillsborough County* in a 1984 recommendation from the Administrative Conference of the United States, which urged agencies to be more sensitive to preemption concerns and to deal with them explicitly in the course of regulatory decision-making. 1 C.F.R. § 304.84-6 (1990). Executive Order 12612, adopted in 1987, also requires agencies to

consider federalism concerns in the course of their regulatory activities. 3 C.F.R. 252-56 (1988).

The agency decision-making process also counsels in favor of courts pausing before they hold that an agency implicitly meant to preempt state law. As *Hillsborough County* noted, agencies normally address issues in more detail than does Congress, 471 U.S. at 717, and it is easier for an agency to articulate its preemptive intent in particular rulings than it is for Congress to address preemption concerns when enacting a broad regulatory statute which does not expressly purport to occupy the field. And if in a given case, an agency does intend for its order to have preemptive effect, but a court later holds that this intent was not adequately expressed, the agency has considerable flexibility under the Administrative Procedure Act to issue a new order clarifying its intent.

Despite these considerations, the decision below indicates that the principles of *Hillsborough County* have not been uniformly followed. In this case, the Tenth Circuit noted that orders of the Federal Energy Regulatory Commission clearly preempted petitioner's simple breach of contract claim, and petitioner does not challenge that ruling here. However, the court of appeals went on to the find that petitioner's claim for breach of the duty to perform in good faith was also preempted, even though the Commission did not expressly address that claim in its order. The court reasoned that the FERC orders needed "room to breathe" (Pet. App. 12a), which meant that state law claims *beyond* those identified in the orders were also preempted. This is hardly an example of a court "pausing" before finding preemption, as *Hillsborough County* requires.

Unfortunately, this case is not an isolated instance, and there are examples outside the realm of natural gas regulation where courts and litigants have argued that agency orders may preempt state claims even when the orders express no preemptive intent.

One current example involves deceptive advertising, an area where both the states and the federal government have authority to regulate and where it has been held that the federal government's authority co-exists quite comfortably with state laws. *See American Financial Services v. FTC*, 767 F.2d 957, 989-91 (D.C. Cir. 1985). In *State of Texas v. Quaker Oats Co.*, No. CA3-89-2350-R (N.D. Tex.), the state sought to use its deceptive practices statute against certain health claims made about Quaker oatmeal. Prior to that time, the FTC staff had denied a citizen petition asking the Commission to file a complaint against Quaker based on the same advertising. Quaker argued that this ruling by the FTC *staff* preempts Texas law, even though only decisions of the full *Commission* can be accorded preemptive effect, *see Kathrine Gibbs School (Inc.) v. FTC*, 612 F.2d 658, 667 (2d Cir. 1979), and even though the FTC staff indicated in letters denying the citizen petition that its ruling was a discretionary decision not to prosecute, based on the facts available at that time. *See Heckler v. Chaney*, 470 U.S. 821 (1985). Although the FTC staff letters denied having *any* legal effect—much less a preemptive effect—the Magistrate recommended denial of Texas' motion for partial summary judgment on this point, agreeing with Quaker that material facts were in

dispute about whether the FTC staff letters had preempted the state's claim.[1]

In a different context, a federal appeals court recently ruled that a consent decree entered in an agency adjudicatory proceeding may preempt state laws even if the decree is silent on preemption. In *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990), the company sought to enjoin various provisions of New York's "lemon law" on the ground that they were preempted by a Federal Trade Commission consent decree affecting arbitration of certain claims between General Motors and its customers, even though the decree did not purport to preempt state law claims. The court determined that, as a general matter, consent orders could be accorded preemptive effect even if they say nothing about preemption, although the court found that, on the facts presented there, no preemptive intent could be imputed to the FTC, nor could preemption be found on the basis of any conflict between the obligations imposed by the consent decree and the state statute. *Id.* at 40-44.

We agree with the result in *General Motors*, but its analysis is troubling insofar as it employed the "field preemption" analysis which *Hillsborough County* counsels against using in regulatory preemption contexts. We submit that, in the absence of any expressly stated preemptive intent on the agency's part, the better analysis (and the one more consistent with *Hillsborough County*) would be to focus on whether a state law

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[1] The FTC staff letters to counsel for Quaker and to counsel for the consumer group filing the petition appear as an appendix to this brief, along with the Magistrate's opinion.

actually conflicts with the agency order, such that it is impossible to comply with both.

This Court has long distinguished between situations where there is an actual conflict between state and federal mandates, such that compliance with both is impossible, *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and situations where state law is said to frustrate the purpose of a federal law or regulation, *see Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See generally Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). In the latter situation, the tension between state and federal requirements is generally less pronounced than in the former, where compliance with both regimes may be physically impossible. Accordingly, a court should hesitate before inferring preemptive intent in the latter situation, particularly if it is dealing with a federal regulation, as opposed to congressional enactments. As *Hillsborough County* noted, agencies can articulate their preemptive intent with greater ease and precision than can Congress, and thus "frustration of purposes" analysis is best left to cases where *Congress's* preemptive intent is at issue, rather than cases where a court is trying to divine an *agency's* preemptive intent. *See* 471 U.S. at 721 and the discussion at pp. 2-4, *supra*.

Nonetheless, as the decision below demonstrates, there seems to be a ready willingness by litigants to argue, and lower courts to find, that preemption exists, based on a perception that an agency's regulatory goals will be thwarted by state law, even though the agency expresses no view on the subject and even though the party subject to the twin regulatory strictures can comply with both. Several recent cases involving federal auto safety standards further illustrate the point. In these

cases, the victims of automobile accidents asserted that manufacturers were negligent under state law on the ground that the vehicles did not contain certain passive restraints. In response, the manufacturers argued that these claims were preempted by the federal statute and by a federal standard issued under that law which gave manufacturers a choice when it came to installing passive restraints technology. The courts addressing these cases all found the claims preempted, with some courts accepting the statutory preemption claim, *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990), and others accepting the regulatory preemption claim, *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990).

When the cases reached this Court, the Solicitor General was invited to file a brief in one of them, and his brief sharply disagreed with the statutory preemption claim, but argued that there was a valid claim of regulatory preemption in at least some cases. In his view, the federal standard, which says nothing about preemption, evinces a preference for giving manufacturers flexibility in choosing compliance options, which implicitly preempts state laws that would mandate the use of one technology over another and that therefore "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the agency]." Brief for the United States as *Amicus Curiae* at 14, *Wood v. General Motors Corp.*, No. 89-46 (O.T. 1989), *quoting Hines v. Davidowitz*, *supra*, 312 U.S. at 67. This same basic analysis has subsequently been adopted in another

circuit, *see Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990).

We have grave difficulty squaring this approach with *Hillsborough County* because in these passive restraints cases, there was no irreconcilable conflict between the state and federal requirements and because, if the agency there really did want its preference for flexibility to override state laws, it could have stated that intent with relative ease in the rule or an amendment to the rule. In any event, whatever reasons the Court may have had for denying certiorari in those cases,[2] they buttress our basic point that regulatory preemption claims are cropping up in a variety of contexts and that there is a need for the Court to clarify the approach which agencies and reviewing courts must following in considering preemption claims in this context.

2. *Hillsborough County* and other regulatory preemption cases decided by this Court (cited at pp. 2-3, *supra*) all involved orders adopted by rulemaking, whereas the FERC orders in this case include some adopted in adjudications as well as by rulemaking. In our view, preemption claims based on adjudicatory orders are even more suspect than preemption claims based on federal regulations, and they should, at the very least, receive the closest scrutiny before finding preemption can be implied from the text of the order.

Unlike rulemaking proceedings, which allow members of the public to raise preemption concerns of which they

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[2] The Solicitor General's brief recommended (at 16-20) that certiorari be denied because there was not an intolerable conflict between the lower courts and because there were certain factual issues which no lower court had addressed.

may be aware at the moment, adjudications generally involve only a limited number of issues and parties. As a result, the orders which emerge from these proceedings are based strictly on the limited factual circumstances presented to the agency. Those facts may have little or no application to absent parties, who may have received no notice about the case or who, if they did know, may have seen no need to intervene (let alone enjoyed a right to do so) because they did not believe that their interests were affected.

A lack of notice and an opportunity to comment would clearly raise due process problems in those cases where an agency order *explicitly* stated an intent to preempt state law. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261-62 (1987); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-14 (1985); *Martin v. Wilks*, 109 S. Ct. 2180 (1989). Those problems would be exacerbated if preemption could be established not on the basis of any explicit agency statement, but on a court's after-the-fact analysis of what an agency *must have* intended to preempt when it drafted its order.

When viewed in this light, the court of appeals' "room to breathe" analysis here is particularly troublesome in the context of agency orders. *General Motors v. Abrams* shows that this case is not an isolated example, since the consent decree there said nothing about preemption, yet the court was urged to decide whether that decree implicitly preempted statutory provisions which were not enacted until several years after the decree had been entered. 897 F.2d at 36-37. As the discussion in Point 1 demonstrated, similar preemption issues will continue to arise in a variety of contexts, absent clarification from the

Court on the question of when and how agencies may preempt state law by regulatory action. Regardless of how one may view this issue on the merits, review should be granted because this case would allow the Court to clarify how the *Hillsborough County* analysis applies to claims of implied preemption based on adjudicatory orders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for *Amicus Curiae*
Public Citizen

June 1990

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 19, 1989

R. Thomas Howell, Jr., Esq.
Vice President and General Corporate Counsel
The Quaker Oats Company
Quaker Tower
321 N. Clark Street
Chicago, Illinois 60610

Re: File No. 882 3173

Dear Mr. Howell:

The Commission has conducted an investigation involving your possible violation of the Federal Trade Commission Act with respect to your advertising of Quaker Oats.

Upon further review, we have determined that no further action is warranted by the Commission at this time. Accordingly, the investigation has been closed. This action is not to be construed as a determination by the Commission that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.

Sincerely,

/s/ William MacLeod
William MacLeod
Director
Bureau of Consumer
Protection

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C.

June 16, 1989

Mr. Bruce Silverglade
Director of Legal Affairs
Center for Science in the Public Interest
1501 16th Street, N.W.
Washington, D.C. 20036

Dear Mr. Silverglade:

This letter is in reference to the CSPI petition regarding advertising of The Quaker Oats Company. You contend that certain of Quaker's print ads mislead consumers by exaggerating the contributions that hot oat cereals can make in preventing heart disease.

You describe these ads as emphasizing that "high blood cholesterol levels are a major risk factor in coronary heart disease," and that "40,000,000 Americans have high cholesterol." Further, as you note, the ads state that a diet that is low in fat, saturated fat, and cholesterol, and high in complex carbohydrates and soluble fiber, can help the reader "eat your way back out of it." These statements you find unobjectionable.

However, you do object to the following language in certain of Quaker's ads:

In recent clinical studies, where Quaker Oats were a daily part of a low-fat, low-cholesterol diet, total serum cholesterol levels dropped on average almost 10%. Other medical studies show such a drop could reduce your risk of heart attack by nearly 20%.

Many experts believe it's the soluble fiber in oats that does it. And, scientists are finding that *oats are one of the best sources of soluble fiber you can get!*

With respect to the state of the scientific knowledge on the relationship between diet, serum cholesterol and heart disease, you state that Quaker in its ads is correct that diets low in fat, saturated fat, and cholesterol can reduce blood cholesterol levels. As you note, authorities such as the National Institutes of Health, the U.S. Department of Agriculture, and the American Heart Association specifically recommend such diets.

The evidence on the relationship between diet and cholesterol comes from a number of studies which you cite in your petition. These studies have found that oat consumption alone and oat consumption combined with low-fat diets can reduce serum cholesterol. In one study, participants experienced an average reduction of 8.7% in serum cholesterol levels from a low-fat diet that included oats. Another study found that a low-fat diet with oatmeal reduced serum cholesterol by 10% in a subgroup of test subjects whose cholesterol level was 198 or greater. (The average level in the U.S. is estimated at 210 to 215). Low density lipoproteins, which are regarded

as the major CHD risk factor in cholesterol, dropped by 15% in the latter study.

You agree that a 10% reduction in blood cholesterol may well reduce heart risks by 20% because "strong scientific evidence indicates that every 1% reduction in the blood cholesterol level of a person who has not suffered a heart attack reduces that person's risk of heart attack by 2%." Thus, you state that if the advertised product could reduce blood cholesterol levels by nearly 10%, it would not be misleading to claim that consumption of this product would reduce heart attack risks by nearly 20%.

However, you contend that the ads lead the reader to conclude that consumption of Quaker Oats alone can reduce serum cholesterol by nearly 10%, and heart attack risk by nearly 20%. You believe that this claim is deceptive in that the studies referred to by Quaker do not support the claim that consumption of oats will alone have this effect. It is therefore our understanding that the primary concern you have with these ads is that consumers would interpret them to mean that the "almost 10%" reduction in serum cholesterol levels mentioned in the ads is due to consumption of Quaker Oats alone, and not due to a low-fat diet which includes Quaker Oats.[1]

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[1] Your petition also questions the use of "almost 10% to describe cholesterol reductions obtained in the first Van Horn study, where the reduction averaged 8.7% over all those who combined dieting with oat consumption. It seems highly unlikely that such a representation deceives consumers, especially in view of the second Van Horn study, which found a

continued

As you note, the factual issue at the center of a legal inquiry under the FTC Act is the net impression that an advertisement conveys to consumers. Your petition contends that the ads imply it is Quaker Oats alone that has been shown to cause the reduction in blood cholesterol level, notwithstanding language in the ad emphasizing the benefits of a low-fat, low-cholesterol diet as a whole. Staff conducted an inquiry to ascertain whether the advertisement was likely to convey the impression you described.

Our investigation indicates that consumers do not take the implied message that Quaker Oats alone caused the claimed reduction in serum cholesterol level. To the contrary, we have concluded that consumers who view the advertising would attribute the reduction to a low-fat diet including Quaker Oats. This conclusion is based on the actual reactions of consumers, as well as our analysis of the ads themselves. Therefore, we do not believe that the evidence would support the conclusions in your petition.

We have communicated our conclusion to Quaker and have been advised that they nonetheless plan to clarify the ads that prompted your petition. Thus, your effort should help prevent questions like these from arising in the first instance. We appreciate your bringing the matter to our attention. And of course, the views we express are

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10.0% cholesterol reduction and a 15% LDL reduction in subjects with average and above-average cholesterol levels.

those of the Bureau of Consumer Protection, not necessarily those of the Commission or any individual Commissioner.

Sincerely yours,

/s/ William C. MacLeod
William C. MacLeod
Director
Bureau of
Consumer Protection

cc: R. Thomas Howell, Jr., Esq.
The Quaker Oats Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STATE OF TEXAS and ROBERT BERNSTEIN	)	
VS.	)	
THE QUAKER OATS COMPANY	)	CIVIL NO. CA 3-89-2350-R
VS.	)	
JIM MATTOX and ROBERT BERNSTEIN	)	

RECOMMENDATION

Under authority of 28 U.S.C. § 636(b) and the Local Rules of this Court, the motion by the State of Texas and Robert Bernstein for judgment on the pleadings or partial summary, filed March 6, 1990, was referred to the magistrate. A hearing was held on April 11, 1990 and counsel for all parties were present. And having reviewed the said motion, as well as the response thereto, including briefs submitted by the parties in support of their respective positions, and having heard the arguments of counsel, I am of the opinion that the motion to dismiss and for partial summary judgment should be denied.

The pleadings by Quaker Oats Company have asserted several substantial constitutional issues, including claims that the actions by the state parties have violated Quaker Oats' First Amendment rights, have placed an intolerable burden upon interstate commerce, and violate the Compact Clause and Equal Protection Clause of the Constitution. Defendant Quaker Oats further argues that the actions by the State and its agents are preempted by actions and orders taken and entered by the United States government through the FTC, the FDA and the FCC. There are numerous fact issues to be determined in order to resolve Quaker Oats' claims. For instance, there is a substantial controversy between the parties as to whether oatmeal is a drug, as the state alleges that it is in the context of this case, or whether it is merely a food product. There are also fact issues which must be resolved in order to apply the required balancing test to determine whether the state regulations, about which Quaker complains, place an intolerable burden on interstate commerce. Other fact issues are questions as to what the FTC, the FDA and the FCC did or did not do, all of which have a bearing upon the preemption issue presented by Quaker in its pleadings.

RECOMMENDATION

I recommend that the motion to dismiss for partial summary judgment be denied.

SIGNED this 12th day of April, 1990.

/s/ John B. Tolle
UNITED STATES MAGISTRATE